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and which Peace Proposal has the Best
Chance of Resolving the Dispute over this
Symbolic Land?

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**NAVAL
POSTGRADUATE
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MONTEREY, CALIFORNIA

THESIS

**WHO HAS LEGAL SOVEREIGNTY OVER JERUSALEM
AND WHICH PEACE PROPOSAL HAS THE BEST
CHANCE OF RESOLVING THE DISPUTE OVER THIS
SYMBOLIC LAND?**

by

Daxton H. Moore

June 2012

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PROPOSAL HAS THE BEST CHANCE OF RESOLVING THE DISPUTE OVER
THIS SYMBOLIC LAND?**

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Lieutenant, United States Navy
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Submitted in partial fulfillment of the
requirements for the degree of

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ABSTRACT

There are four schools of thought as to who has legal sovereignty over Jerusalem, and this is one of the primary reasons why there has been no resolution to the problem. The first is that there was a vacuum of sovereignty in the wake of British withdrawal, which was filled by Israel after the first Arab-Israeli War and again as a need for self-defense after the 1967 War; the second is the idea that the Palestinians have always held legal sovereignty over Jerusalem and continue to do so today; the third thought is that Jordan still has a legal right to the eastern section of Jerusalem due to the outcome of the first Arab-Israeli War; and the fourth is that the United Nations has legal sovereignty due to the mandate that was created by the League of Nations at the conclusion of the First World War. These four claims form the basis behind the legal argument over Jerusalem and are discussed in this thesis in order to determine legal sovereignty over the city and provide the background information necessary to proceed toward a peaceful resolution. In the conclusion of this thesis, I point out that both Israel and the Palestinians have legal sovereignty of Jerusalem and therefore, joint control of the city should be pursued in the form of a type of condominium.

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LIST OF ACRONYMS AND ABBREVIATIONS

EU.....	European Union
MFA.....	Ministry of Foreign Affairs
PASSIA.....	Palestinian Academic Society for the Study of International Affairs
PA.....	Palestinian Authority
PLO.....	Palestinian Liberation Organization
UN.....	United Nations
UNISPAL.....	United Nations Information System on the Question of Palestine
UNSCR.....	United Nations Security Council Resolution

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I. LEGAL SOVEREIGNTY OVER JERUSALEM

Present-day Israel is located in a region that has been fought over for more than 1000 years. Although these conflicts have been between various factions there has almost always been one common denominator and that is control of the city of Jerusalem. For the Jews, Muslims, and Christians Jerusalem represents religious beginnings and still houses vital sites for each faith. The Wailing Wall in Jerusalem is part of the original temple built by Herod the Great and therefore has great meaning to the Jews but it is also the location where Muhammad left the earth to visit heaven making it equally important to Muslims. In addition, Jerusalem is the city where Jesus was crucified and ascended to heaven from making it important to Christians. With three religions claiming the city to be religiously important it is clear why it is so heavily contested.

However, over the last century the reason for the conflict has expanded due to the creation of modern day Israel in the land of Palestine. This dispute began before the Balfour Declaration in 1917, intensified during the partition of Palestine in 1947 and finally came to a head erupting into three Arab – Israeli wars in 1948, 1956, and 1967. Since the end of the Six Day war in 1967 the dispute between the Israelis and Palestinians has intensified and an ongoing conflict has developed. This conflict revolves around multiple issues, one of which is the claim that both sides maintain toward the control of Jerusalem which contains holy sites for Christianity, Islam, and Judaism. There are differing schools of thought that try to explain which side actually has sovereignty over Jerusalem and there are also differing ideas for bringing about a resolution to the problem. Therefore, the goal of this thesis will be to analyze the differing perspectives in order to answer the question of who has legal sovereignty over Jerusalem and which peace proposal has the best chance for resolving the dispute over this symbolic land? It is necessary to first answer the question of legal sovereignty in order to provide a foundation for the argument over which peace proposal to pursue.

A. IMPORTANCE

During the last half century the ongoing conflict between Israel and Palestine has produced three major conflicts, multiple attacks and counter attacks by the Israelis and Palestinians, two intifadas or uprisings, and innumerable bombings and terrorist attacks. Lives on both sides are lost on a constant basis creating more and more tension in the region. But this issue does not cease at the border. Peace between the Israelis and Palestinians is a discussion that is brought up by countries around the world but more importantly it remains a key issue for U. S. foreign policy.

In order for the United States to ensure its own security and have any chance for a successful foreign policy in the Middle East it must find a way to help bring about a peace agreement between the Israelis and Palestinians. This in turn would also help several U.S. interests in the region, four of which will be covered here. First, U.S. relations with many in the region, in particularly Turkey, would improve. Turkey has been a major ally in the past despite the situation with Israel and Palestine but in recent years this support has waned. This is because many Turks feel sympathetic towards the Palestinian cause and are against the pro-Israeli stance taken by the U.S.¹ The importance of this support was seen during the invasion of Iraq when Turkey refused to allow U.S. forces on their territory. Turkish support was needed throughout the Cold War and will continue to be needed in the future, especially in light of the Arab Spring and the transition to democracy that many countries in the region are making. The primary means for this relationship to improve would be to support bringing about a successful peace agreement between Israel and Palestine thereby increasing U.S. credibility and reducing the belief in U.S. hypocrisy. Turkey is just one example of the many Muslim countries where U.S. relations would improve with a successful peace treaty between Israel and the Palestinians.

Second, the United States is very interested in the stability of the region. This is due in part to the fact that the region produces the world's largest supply of oil. The U.S. is concerned with secure, stable, and low priced oil supplies which are based on regional

¹ Ioannis Grigoriadis, "Friends No More? The Rise of Anti-American Nationalism in Turkey," *The Middle East Journal*, 64 (2010): 55.

stability.² Resolving the Arab-Israeli conflict will increase stability in the Middle East. Due to the occurrence of the Arab Spring it is now more important than ever to bring about a solution to this issue because without one the new democracies, in particular Egypt, may choose to vote against supporting the previous peace agreement further destabilizing the region.

Third, a successful peace agreement between Israel and Palestine may help to alleviate some of the issues with Iran. Iran continues to pursue a nuclear weapons program and provides support for insurgents that are fighting western forces. Despite the fact that Iran is feared by many to become a possible future hegemon in the region they are still able to pursue their interests in part because of their support for Palestine and anti-Americanism. Shenna states that “Iran’s denial of the right of existence to the state of Israel stems from its revolutionary ideology. It is kept alive by Iran’s dissatisfaction with U.S. support for Israeli power, a feeling shared in the Arab world. In its support for the Palestinian cause, Iran has always emphasized the anti-imperialist and revolutionary aspects of the Palestinian struggle.”³ While it will take more than a peaceful settlement between the Israelis and Palestinians to quell Iran’s anti-western sentiment an agreement will remove some of the support they receive from the Arabs.

Finally, the Global War on Terrorism would gain support in the region if there was a successful solution to the Israeli-Palestinian conflict. This is because a U.S. backed peace settlement would remove a lot of the western opposition in the Arab states. The importance of a peaceful settlement can be seen in Reich’s statement that after the September 11th attacks, “bin Laden continued to link the attacks to the plight of the Palestinians, which he attributed to unequivocal American support for Israel.”⁴ Now whether or not the attacks were committed for this reason is irrelevant but what is relevant is the fact that the statement was made thereby bringing up emotions and support

² Bichler, Shimshon, and Jonathan Nitzan, “Putting the State in it’s Place: U.S. Foreign Policy and Differential Capital Accumulation in Middle East Energy Conflicts,” *Review of International Political Economy*, (1996): 618.

³ John Shenna, “The Case Against the Case Against Iran: Regionalism as the West’s Last Frontier,” *The Middle East Journal*, 64 (2010): 360.

⁴ Bernard Reich, “Israel’s Quest for Peace,” *Mediterranean Quarterly* Spring (2002): 93.

for attacks on U.S. soil. In addition, it adds fuel to the belief that the United States is hypocritical and further diminishes support in the region.

B. LITERATURE REVIEW OF THE DIFFERING VIEWPOINTS

This literature review focuses on the proposals and differing schools of thought surrounding legal sovereignty over Jerusalem. In addition, I will also look at the differing schools of thought for bringing about a possible solution to the Jerusalem problem. Both of these questions have four primary schools that will be covered. Some of these schools overlap and this will be pointed out during the review.

1. Differing Claims

There are four differing schools of thought as to who has legal claim to Jerusalem and this is one of the reasons why there has been no resolution to the problem. Ruth Lapidoth provides a discussion for the following four schools of thought: the first is that there was a vacuum of sovereignty in East Jerusalem which was rightfully filled by Israel due to their need for self-defense; the second is the idea that the Palestinians hold legal sovereignty over East Jerusalem; the third thought is that Jordan still has legal right to East Jerusalem; and the fourth is the United Nations' idea for making Jerusalem a city governed by the international community.⁵ These four claims are the basis behind the argument over East Jerusalem and each claim is supported by a large number of people. Eisenberg, Caplan, Quandt, and Said all discuss these differing claims in their works but they provide a broad look at the subject and answering this question will require a more in depth look.

The first idea is that Jerusalem lacked any sovereign control because it was abandoned by Britain and then occupied by Jordan during an act of illegal aggression. Therefore, when the city was occupied by Israel during an act of self-defense they became the legal sovereign of the city.⁶ This belief is supported by many in Israel but few

⁵ Ruth Lapidoth, *Jerusalem and the Peace Process-Jul-94*, 1994, http://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1994/7/JERUSALEM+AND+THE+PEACE+PROCESS+-+Jul-94.htm.

⁶ Ruth Lapidoth, "Jerusalem: Some Legal Aspects," in *Jerusalem: A City and its Future*, by Marshall Berger and Ora Ahimeir, 61–90 (Syracuse: Syracuse University Press, 2002): 73.

elsewhere. In fact, many states around the world have denounced Israel's occupation of East Jerusalem. However, despite the opposition there may be some legal truth to the Israeli claim. Stone states that "on the level of international law Israel's standing in East Jerusalem and elsewhere extends well beyond that of belligerent occupant and there are legal grounds for thinking that Israel is already vested with territorial sovereignty."⁷ Stone continues to support Israel's claim by stating that the only remaining requirement is for Israel to officially and formally announce the annexation of East Jerusalem.⁸

The second thought is that the Palestinians hold sovereignty over not just East Jerusalem but all of the land known as Palestine.⁹ Many in the Arab community still support this belief and some do so by taking a counter stance to Stone's position. Mallison for example states that the status of East Jerusalem is that of an occupied territory.¹⁰ In addition Quigley carries this idea further by stating that "rights are not lost when a population is forced out of its territory. Thus, the incipient state of Palestine, provisionally recognized by the League of Nations, in its population composition prior to the forced expulsions of 1948, carries the right of sovereignty."¹¹ Henry Cattan further confirms the Palestinian right to Jerusalem by citing and discussing UN General Assembly resolution 3236 which reaffirms the inalienable rights of the Palestinian people. Cattan claims that this resolution refers to the "whole of Palestine and thus recognizes the legitimacy of the title of the people of Palestine to their homeland"¹² and therefore their right to East Jerusalem.

⁷ Julius Stone, *Israel and Palestine* (Baltimore: The Johns Hopkins University Press, 1981): 132.

⁸ Julius Stone, *Israel and Palestine* (Baltimore: The Johns Hopkins University Press, 1981): 132.

⁹ Ruth Lapidoth, "Jerusalem: Some Legal Aspects," In *Jerusalem: A City and its Future*, by Marshall Berger and Ora Ahimeir, 61–90 (Syracuse: Syracuse University Press, 2002): 73.

¹⁰ Thomas Mallison and Sally Mallison, *The Palestine Problem In International Law and World Order* (London: Longman Group Limited, 1986): 228.

¹¹ John Quigley, "The Legal Status of Jerusalem Under International Law," *The Turkish Yearbook of International Relations* (1994): 21.

¹² Henry Cattan, *Palestine and International Law* (London: Longman Group, 1976), 130.

The third idea is that Jordan holds sovereignty over East Jerusalem because of the self-determination of the inhabitants.¹³ Early on this thought was supported by many in the Arab community. Amos Shapira points out that during the Camp David accords the “Egyptian delegation submitted a proposal that governmental powers be taken from Israel and returned to the self-governing authority.”¹⁴ This would return control of East Jerusalem and most of the West Bank to Jordan. But, today few people support this because of the stance taken by Jordan during the 1994 peace treaty. During this treaty the Jordanians agreed to recognize Israeli borders without prejudice to the status of territories that came under control as a result of the 1967 war. However, this thought still has supporters and these include some of the residents of East Jerusalem.

Finally, the fourth school of thought is that the corpus separatum solution proposed by the United Nations still applies to all of Jerusalem, not just East Jerusalem, and therefore the city should fall under international sovereignty.¹⁵ While this idea is supported by few on either the Israeli or Palestinian sides it does have international support. For example, the United Nations recognizes Israel as a legal occupying force but does not recognize its sovereignty over Jerusalem and supports corpus separatum until a final resolution is reached. In addition the UN in resolution 446 stated that “the practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967 have no legal validity.”¹⁶ Further, Henry Cattan ,who earlier supported the

¹³ Ruth Lapidot, “Jerusalem: Some Legal Aspects,” In *Jerusalem: A City and its Future*, by Marshall Berger and Ora Ahimeir, 61–90 (Syracuse: Syracuse University Press, 2002), 73.

¹⁴ Amos Shapira, “Reflections on the Autonomy: The Camp David Accords and the Obligation to Negotiate in Good Faith,” In *Models of Autonomy*, by Yoram Dinstein, 283–290 (Tel Aviv: Tel Aviv University Press, 1981), 283.

¹⁵ Ruth Lapidot, “Jerusalem: Some Legal Aspects,” In *Jerusalem: A City and its Future*, by Marshall Berger and Ora Ahimeir, 61–90 (Syracuse: Syracuse University Press, 2002), 73.

¹⁶ “United Nations Security Council,” United Nations, March 22, 1979, <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/370/60/IMG/NR037060.pdf?OpenElement>.

Palestinian claim to East Jerusalem has, in recent years, shifted to supporting the corpus separatum school of thought.¹⁷ This school of thought has the largest following among the international community.

2. Differing Solutions

There are four different scenarios for how to proceed with the peace process regarding Jerusalem: turn Jerusalem into an international city governed by the international community; maintain the city united under one state; create a shared city where both states can claim sovereignty; or return to a partitioned city. Some of these options tie directly into the sovereignty claims surrounding the city which is why it is necessary to attempt to answer the legal aspect before moving forward with the peace proposal. The first option of placing Jerusalem under international control has faced opposition from both sides but maintains a large following from the international community. The United Nations and the European Union both support the idea of corpus separatum, or international control. In addition to this there are some in the academic and legal communities that support partial or limited international control. Berger states that due to the sensitivity of Jerusalem “a degree of functional internationalization may be warranted.” This may be viewed by many as the best option but it will be difficult to sway either Israel or the Palestinians toward it.

The second option of maintaining the city united under the control of one state has little chance for support. This is because both Israel and the Palestinians want control and neither side is willing to relinquish any portion of the city to the other. Further, the international community has overwhelmingly come to support the idea that the Israeli presence in East Jerusalem is an occupation and in some cases it is considered to be a belligerent occupation. Khadduri states that “occupation does not displace or transfer sovereignty. The occupant does not acquire sovereignty unless or until it is ceded to the occupant by treaty of peace.” Based on this point the only possibility for Israel to gain international support for complete sovereignty over Jerusalem is for the Palestinians to

¹⁷ Henry Cattan, “The Status of Jerusalem,” In *Arab -Israeli Relations: Economic, Legal, and Demographic Dimensions of Arab-Israeli Relations*, by Ian Lustick, 51–63 (New York: Garland Publishing Inc., 1994), 63.

relinquish their right. The same point applies to a united Jerusalem under Palestinian control. Therefore, this option has virtually no chance for success and will not be covered during this thesis.

The third idea of sharing the city has some support from all parties involved and considerable support from those on the outside looking in. In the article *The Status Quo for Jerusalem*, Emmett states that this approach is “the only solution with any possibility of acceptance by both groups.” This is because “neither group is willing to relinquish control to the other and a united Jerusalem under only one state would never know peace.” Gerson agrees with Emmett by pointing out that “the best arrangement appears to be that of a condominium whereby the administration of joint aspects of the city’s life might be shared among Israel and a Palestinian state and allowing each of the holy places to be controlled by its own religious community.” Another reason for supporting the shared city idea is the fact that separating the city and reverting back to the 1967 border is virtually impossible. Menachem Klein points out that “in many cases the city boundary runs down the middle of houses and Arab neighborhoods, and over the years villages that lie outside the municipal boundaries have become suburbs of East Jerusalem.” The problem with this approach is that sharing the city means uniting two groups of people that have been in continuous conflict and expecting them to work together peacefully.

The final option of separating the city between east and west has promise but is not without difficulty. While neither the Israelis nor Palestinians are willing to give up any part of Jerusalem there are many that feel this is the only true chance for peace. This is because “without a credible sovereign presence in Jerusalem, the new state of Palestine will suffer a serious legitimacy deficit among its people.” Based on this statement there clearly must be some type of division. Menachem Klein in his book *The Jerusalem Problem* supports a divided Jerusalem by proposing a soft partition with reduced Israeli and Palestinian powers in Old City. Generally when discussing a divided Jerusalem between east and west many envision a wall completely isolating one side from the other but this is not the approach Klein is suggesting. In the article *Jerusalem as an Israeli Problem*, Klein elaborates on his idea by stating “A physical border will separate the two cities, with friendly crossings for controlled transfer from one side to the other. The two

sides must administer the border jointly. The city's historical center, the Old City, will be open to all with its sovereignty divided." If there is going to be a divided Jerusalem than there must be an approach similar to Klein's idea because the Old City with all of its religious landmarks will have to remain open to all if there is going to be peace.

This option was also looked at during the Oslo Peace Accords but was put on hold with the idea that it would be dealt with after the lesser issues were agreed upon. It was not until after Oslo that this idea gained support. The Beilin – Abu Mazen understanding was a secret negotiation conducted in 1994–95 between Israeli and Palestinian teams that led to an understanding regarding Jerusalem. This understanding would change Jerusalem's borders and expand the territory which "would be divided into five political-municipal areas: the capital of Israel, the capital of Palestine, the Temple Mount, the Old City, and the Arab and Jewish neighborhoods on the east side of the city." There would be an umbrella municipality and two sub municipalities. Overall control would fall to Israel but the sub municipalities would be split between a Jewish west and Palestinian east where each would be responsible for their own neighborhoods and services. "The Arab section would be called al-Quds and would be the capital of the Palestinian state while the Israeli part of the city, including West Jerusalem, would be the Israeli capital. Each side would recognize the other's capital." However, in the end this was rejected by many because it broke three rules regarding Jerusalem that the majority of the Israelis, especially those in the Likud party, hold sacred: "negotiation of Jerusalem's borders, conceding Israeli sovereignty, and challenging the assumption of a national consensus against dividing Jerusalem." Despite this, I believe that this option, if revisited and made public, may bring about the best possible solution.

This thesis will attempt to determine who has legal sovereignty over Jerusalem by examining the four major claims to the city. All of these claims have some legal basis but there can only be one party that has sovereignty. Based on the literature review and the reading thus far I believe that I will find that Jordan no longer has any rights to claim sovereignty over the city and at this point I also believe that Israel is only an occupying force. However, the dispute as to whether the UN or the Palestinians should have sovereignty will be more difficult to determine.

Finally, after determining who has legal sovereignty over the city I will examine the options for a peaceful resolution to the dispute in an attempt to determine which option has the best chance for success. All four of the options have some amount of following but at this point I believe that the idea of maintaining the city united under one state has no chance for success. I also believe, at this early stage, that the best option will be a type of hybrid where the city falls under international or joint control initially and then is partitioned between the two states.

C. METHODS AND SOURCES

This thesis will cover the status of Jerusalem from 1947 to the present, the differing controlling forces, how the legal claims evolved, which claim has the strongest legal stance, and the four primary policy options. More precisely I will be looking at the legal studies and writings surrounding this topic. This question is legally based and will require extensive reliance on legal documents, books, and studies as well as United Nations resolutions and the reasons for the stance taken by other organizations like the European Union. In addition, I will analyze the policy options and compare them to the results discovered in the legal debate. The sources for policy options will consist primarily of past policy attempts and the recommendations of various scholars. By completing a comparison between the legal status and policy options I will be able to find common links and patterns between the two allowing me to present a policy option based on a previously established legal claim.

D. THESIS OVERVIEW

The status of Jerusalem is at the heart of the Israeli–Palestinian conflict and must be covered in any discussion about it. Control of Jerusalem is a historical, religious, and emotional area of contention between both parties and therefore it must be looked at from the point of view of both parties in order to understand the issues and reasons for the dispute. For this reason, this thesis consists of five chapters; first is the introduction consisting of the proposed question, the literature review, and the hypothesis: the second will look at the United Nations legal standing and whether or not it has any right to sovereignty over the city; the third will focus on the Israeli claim and the debate between

sovereignty or occupying force; the fourth will look at the Arab claim to Jerusalem and will cover both the Jordanian claim to sovereignty through self-determination and the Palestinian claim through legal arguments; the fifth and final chapter will be dedicated to the findings of the previous chapters in order to provide a look at the options for a peaceful agreement. The final section for this last chapter will provide a conclusion for the thesis which will include my thought as to who has legal sovereignty over the city and what I believe to be the best possible policy proposal for how to proceed with future peace efforts in the region.

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II. THE UNITED NATIONS CLAIM TO JERUSALEM

A. EARLY HISTORY

1. The End of the Ottoman Empire

The first school of thought is that the *corpus separatum* solution proposed by the United Nations still applies to all of Jerusalem, not just East Jerusalem, and therefore the city should fall under international sovereignty.¹⁸ While this idea is supported by the European Union and many in the United Nations does it actually have any legal backing? In order to answer this question it is necessary to look back at history starting with the Ottoman Empire. It is important to begin with this point in history because in order to determine legal sovereignty there must be some unbroken path to the present day and the Ottoman Empire provides a good starting point for this argument. Further, it is fair to both the Israelis and Palestinians to start with a neutral party that acted as the legal sovereign for a considerable period of time.

In 1517, the Ottoman Empire attacked and conquered the city of Jerusalem taking it from the Mamelukes who had held the city for the previous 300 years. The Ottoman Empire held the city virtually unopposed until World War I when they allied themselves with Germany. Throughout the war, and even for a few years before it, the Ottoman Empire was successful at maintaining control of Jerusalem and most of Palestine. However, towards the end of the war the British onslaught was successful in removing the Ottoman 7th Army from Jerusalem and forcing the surrender of the city. The decree of the surrender of Jerusalem reads,

Due to the severity of the siege of the city and the suffering that this peaceful country has endured from your heavy guns; and for fear that these deadly bombs will hit the holy places, we are forced to hand over to

¹⁸ Ruth Lapidot, "Jerusalem: Some Legal Aspects," In *Jerusalem: A City and its Future*, by Marshall Berger and Ora Ahimeir, 61–90 (Syracuse: Syracuse University Press, 2002), 73.

you the city through the mayor of Jerusalem, hoping that you will protect Jerusalem the way we have protected it for more than five hundred years.¹⁹

The surrender of Jerusalem to the British can be seen as legally binding because the Ottoman Empire officially surrendered control of the city. This is a necessary step in the transfer of legal sovereignty. Khadduri states that “occupation does not displace or transfer sovereignty. The occupant does not acquire sovereignty unless or until it is ceded to the occupant by treaty of peace.”²⁰ If the surrender of Jerusalem does not fully meet the requirement for transfer of sovereignty than the Treaty of Sevres does. Article 132 of the treaty states that,

Outside her frontiers as fixed by the present Treaty Turkey hereby renounces in favor of the Principal Allied Powers all rights and title which she could claim on any ground over or concerning any territories outside Europe which are not otherwise disposed of by the present Treaty.²¹

The surrender of Jerusalem combined with the Treaty of Sevres provides the legal justification required to transfer control of the city and the region to the Allied Powers.

2. The League of Nations Assumes Control

After the surrender of Jerusalem and the region of Palestine, the League of Nations created articles and mandates in order to provide the framework for its control and administration. Great Britain was given the mandate to administer Palestine, and therefore Jerusalem, following the Turkish surrender. The mandate was shaped by Article 22 which focused on the welfare and development of areas that were previously under Turkish control in order to assist them in becoming an independent nation.²² However, with Britain in control of Palestine they were able to honor the Balfour Declaration which

¹⁹ “The Fall of Jerusalem, 1917,” firstworldwar.com, August 22, 2009, <http://www.firstworldwar.com/source/jerusalemdecree.htm>.

²⁰ Majid Khadduri, *Major Middle Eastern Problems in International Law* (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1972), 42.

²¹ *World War I Document Archive*. (May 20, 2009) http://wwi.lib.byu.edu/index.php/Section_I,_Articles_1_-_260.

²² Henry Cattan, “Jerusalem: Israeli Concepts, Policies and Practices,” In *Israeli Settlements in the Occupied Arab Territories* (Dar Al-Afaq Al-Jadidah, 1985), 126.

was an agreement made with Zionists on November 2, 1917. This declaration called for the establishment of a Jewish national home in Palestine and was incorporated as an objective in the League of Nations' mandate.²³ The Balfour Declaration brought about a major change to the demography of Jerusalem. In 1917, there were 30,000 Jews in Jerusalem but the British mandate allowed a massive immigration into the area and by the end of 1946 there were more than 99,000 Jews compared to 105,000 Arabs.²⁴ Therefore, it is this declaration that brought about the formation of and legal sovereignty for a Jewish state. However, this state was limited and did not include any part of Jerusalem.

Jerusalem was deemed too valuable to fall under the control of a single state therefore the League of Nations decided to retain the city instead of turning it over to Britain. Article 13 of the League of Nations mandate of 1922 states that:

the holy places and religious buildings or sites in Palestine, including that of preserving existing rights and of preserving access to the holy places, religious buildings and sites and the free exercise of worship shall be responsible solely to the League of Nations in all matters connected herewith.²⁵

This article clearly points out that all holy places will fall under the control of the League of Nations. While this article does not specifically state that Jerusalem is included, the fact that the Old City contains holy sites for Islam, Judaism, and Christianity is enough to indicate that it falls into the realm of the protected. Because of this and the fact that the League of Nations acquired legal sovereignty from the Ottoman Empire through the Treaty of Sevres indicates, at this point, that the League of Nations had the right to place Jerusalem under its control. Further, the final treaty of World War I, the Treaty of Lausanne, eliminates any doubt that the League of Nations had legal sovereignty at this point. The Treaty of Lausanne, which superseded the Treaty of Sevres, was signed by Turkey in 1923. In Article 16 of this treaty, Turkey renounced all rights and title over

²³ Henry Cattan, "Jerusalem: Israeli Concepts, Policies and Practices," In *Israeli Settlements in the Occupied Arab Territories* (Dar Al-Afaq Al-Jadidah, 1985), 126.

²⁴ Official Records of the 2nd session of the General Assembly, Ad Hoc Committee on the Palestine Question, P. 304 as seen in Henry Cattan, *The Palestine Question* (New York: Croom Helm, 1988), 250.

²⁵ Elihu Lauterpacht, *Jerusalem and the Holy Places* (London: Anglo-Israeli Association, n.d.): 7.

Palestine. Therefore, for a second time, Turkey confirmed that the title to Palestine was officially given to the Principal allied and Associated Powers who had in turn given all rights to the League of Nations.²⁶ To this point, it can be argued that the chain of legal sovereignty is unbroken and not in question. However, from this point on, the chain of legal sovereignty becomes more difficult to follow.

3. Immigration and the Peel Commission

Between the years 1923 and 1946, there were a lot of changes in and around Jerusalem, especially when talking about demographics. As mentioned earlier, there was a mass immigration of Jews into the region due to the Balfour Declaration. This brought about a lot of tension with the Arabs in the region that developed into riots and eventually armed conflict. Many of the riots revolved around Jerusalem and the holy places, in particular the Wailing Wall, Dome of the Rock, and the Aqsa Mosque which are located within close proximity and held sacred by both Muslims and Jews. These conflicts required the increased presence of British troops and these troops were used for both policing and combat operations. In one case the British troops were used to expel Palestinians from Jerusalem itself. The mounting casualties and continued hostilities forced the League of Nations and the British government to take action in order to discover the underlying causes of the conflict and bring it to a conclusion. This action took place in the form of a report known as the Palestine Royal Commission or Peel Commission which took place from 1936–37. The Peel Commission was appointed to:

ascertain the underlying causes of the disturbances which broke out in Palestine; to enquire into the manner in which the Mandate for Palestine is being implemented in relation to the obligations of the Mandatory towards the Arabs and the Jews respectively; and to ascertain whether, upon a proper construction of the terms of the Mandate, either the Arabs or the Jews have any legitimate grievances on account of the way in which the Mandate has been or is being implemented; and if the

²⁶ Elihu Lauterpacht, *Jerusalem and the Holy Places* (London: Anglo-Israeli Association, n.d.): 13.

Commission is satisfied that any such grievances are well-founded, to make recommendation; for their removal and for the prevention of their recurrence.²⁷

What the Peel Commission determined as the underlying causes were the desire for Arab national independence and the fear of a Jewish national home in Palestine.²⁸ In order to correct these problems and prevent future conflict the commission came up with a recommendation to partition the area into two separate sovereign states, one Jewish and one Arab. However, it was determined that this partition would not include any part of Jerusalem. The commission states that, “the Partition of Palestine is subject to the overriding necessity of keeping the sanctity of Jerusalem and Bethlehem inviolate and of ensuring free and safe access to them for all the world.”²⁹ By this statement, the commission recommended that the cities of Jerusalem and Bethlehem with all their holy places should remain under the control and protection of the League of Nations. The commission went further by saying that this mandate should only be terminated if the United States and the League of Nations decide to do so.³⁰ The recommendations made by the Peel Commission were rejected by both the Arabs and the Jews. The Arabs did not want any type of Jewish home in Palestine while the Jews wanted more than the land that was offered by the commission and wished to continue negotiations. However, all negotiations and further pursuit of a peaceful solution and partition would be postponed because Europe quickly found itself involved in another world war.

²⁷ *United Nations Information System on the Question of Palestine* (2011), <http://unispal.un.org/unispal.nsf/vDateDoc?SearchView&Query=peel%20and%20commission&Start=1&Count=20>.

²⁸ *United Nations Information System on the Question of Palestine* (2011), <http://unispal.un.org/unispal.nsf/vDateDoc/?SearchView&Query=peel%20and%20commission&Start=1&Count=20>.

²⁹ *United Nations Information System on the Question of Palestine* (2011), <http://unispal.un.org/unispal.nsf/vDateDoc/?SearchView&Query=peel%20and%20commission&Start=1&Count=20>.

³⁰ *United Nations Information System on the Question of Palestine* (2011), <http://unispal.un.org/unispal.nsf/vDateDoc/?SearchView&Query=peel%20and%20commission&Start=1&Count=20>.



Palestinian Academic Society for the Study of International Affairs (PASSIA)

Figure 1. Peel Commission Partition Plan³¹

³¹ Passia, "Peel Commission Partition Plan," *Palestinian Academic Society for the Study of International Affairs* (2011), http://www.passia.org/palestine_facts/MAPS/1938-british-partition-plan.html.

4. Transfer of Control to the United Nations

After the conclusion of World War II the allies decided to form a new world organization and disband the former League of Nations. The newly formed United Nations would now be responsible for handling all aspects of the Israeli-Palestinian problem, including control over the city of Jerusalem and all its holy places. The problem with this is that the method for transferring control of a city from one organization to another is not very common nor is it set in stone. As mentioned above, it was the League of Nations that had legal sovereignty prior to World War II but this control may not have been completely or properly passed on to the new organization. In fact, this problem goes further than just Jerusalem because it appears that when the League of Nations dissolved there was no actual formal turnover of control of any of the mandated territories to the United Nations. It is possible that there was nothing more than an understanding or an informal agreement between the two organizations that would allow for members currently administering territories under the mandate to continue to administer for the wellbeing of the people and the prosperity of the countries involved until other arrangements had been agreed upon by the United Nations.³² In short, the members of the mandate felt that nothing had changed during the transition from the League of Nations to the United Nations and therefore they would maintain their existing role within their respective regions without the need for any type of legal transfer of control. This is important because if there was no actual transfer of legal sovereignty from the League of Nations to the United Nations then the UN would never have had any claim to the city.

If the League of Nations legal sovereignty ends without transfer to another entity then who does legal sovereignty fall to? This question was answered, although not directly, on July 11, 1950, when the International Court of Justice passed a ruling on South-West Africa which was another region under the mandate. The court stated that the,

Union Government will regard the dissolution of the League as in no way diminishing its obligations under the Mandate, which it will continue to

³² Elihu Lauterpacht, *Jerusalem and the Holy Places* (London: Anglo-Israeli Association, n.d.), 14.

discharge with the full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the Territory.”³³

In this statement the International Court of Justice has set a legal precedent that even after 1946, the status of a mandated territory could not be altered without the consent of the General Assembly of the United Nations. This statement further suggests that some, if not all, of the League’s legal sovereignty previously held by the mandatory had been transferred to the United Nations.³⁴ Therefore, up to this point the chain of legal sovereignty remains unbroken and the United Nations retains the claim to Jerusalem after the League of Nations was dissolved.

B. RECENT EVENTS

1. The First Arab-Israeli War

The United Nations continued where the League of Nations left off with regards to the idea of Jerusalem being an internationally controlled city. Early in its existence the United Nations General Assembly recommended internationalization for Jerusalem. In order to complete this they would have to establish a special international regime for the city. This regime would effectively make Jerusalem a separate body or *corpus separatum* because it would be an independent city not attached to any state. “The UN General Assembly considered the question of Palestine in 1947 and a resolution sponsored by the U.S. Government was adopted. This resolution called for the termination of the British mandate, the partition of Palestine into Arab and Jewish states and the establishment of Jerusalem as a *corpus separatum* which would be placed under a special international regime.”³⁵ Resolution 181 received the consent of the national leadership of the Jewish community of Palestine but the Arabs rejected it because “they considered it to be beyond the powers of the General Assembly and to constitute an infringement of the right of the

³³ *The International Court of Justice (2011)*, <http://www.icj-cij.org/docket/index.php?p1=3&p2=5&p3=-1&y=1950>.

³⁴ Elihu Lauterpacht, *Jerusalem and the Holy Places* (London: Anglo-Israeli Association, n.d.), 38.

³⁵ Henry Cattan, “Jerusalem: Israeli Concepts, Policies and Practices,” In *Israeli Settlements in the Occupied Arab Territories*, (Dar Al-Afaq Al-Jadidah, 1985), 127.

Arab people of Palestine to determine their own political future.”³⁶ However, despite this rejection, the U.N. General Assembly officially adopted resolution 181 on November 29, 1947, and called for economic union between the two states.³⁷ This resolution quickly led to Arab attacks on Jewish towns and villages throughout the region.³⁸ These attacks soon expanded into the first Arab-Israeli War.

The Arab-Israeli war commenced in 1948 as British troops were in the process of being withdrawn from Palestine after the termination of their mandate. On May 14, 1948, the state of Israel declared itself an independent nation. “The declaration did not mention Jerusalem, but it declares that Israel will safeguard the holy places of all religions.”³⁹ On May 15, 1948, the day after Israel declared independence, the Arab Army invaded. During this war the Israeli defense force was able to take control of West Jerusalem while the Jordanian army held East Jerusalem and the Old City. “The Jews proclaimed the state of Israel purportedly under the UN partition resolution. But, in fact the state which emerged did not respect the provision of the resolution, geographically or otherwise, and during the war between it and the Arab states it seized Modern Jerusalem as well as much of the territory earmarked for the Arab state.”⁴⁰ The war ended on January 6, 1949, when the two sides reached an armistice which established a border for the Israeli and Palestinian states known as the Green Line. The Green Line separated the Israeli occupied West Jerusalem from East Jerusalem which remained under the control of the Jordanian army.⁴¹ While the United Nations still wanted to pursue the corpus separatum option it was now completely unacceptable to both the Israelis and Palestinians.

³⁶ Elihu Lauterpacht, *Jerusalem and the Holy Places* (London: Anglo-Israeli Association, n.d.), 16.

³⁷ Elihu Lauterpacht, *Jerusalem and the Holy Places* (London: Anglo-Israeli Association, n.d.), 15.

³⁸ Ruth Lapidot, “Jerusalem: Some Legal Aspects,” In *Jerusalem A City and Its Future*, by Marshall Breger and Ora Ahimeir (Syracuse: Syracuse University Press, 2002), 65.

³⁹ Ruth Lapidot, “Jerusalem: Some Legal Aspects,” In *Jerusalem A City and Its Future*, by Marshall Breger and Ora Ahimeir (Syracuse: Syracuse University Press, 2002), 65.

⁴⁰ Henry Cattan, “Jerusalem: Israeli Concepts, Policies and Practices,” In *Israeli Settlements in the Occupied Arab Territories* (Dar Al-Afaq Al-Jadidah, 1985): 127.

⁴¹ Maya Choshen, “Jerusalem in Our Time: Past, Present, and Future,” In *Jerusalem A City and Its Future*, by Marshall Breger and Ora Ahimeir (Syracuse: Syracuse University Press, 2002), 20.

The first Arab-Israeli war is another important event in the chain of legal sovereignty for the city of Jerusalem for one key reason. Does the armistice and recognition of the Green Line, approved by the UN, separating East and West Jerusalem constitute the transfer of legal sovereignty of the city? If it does then at this point in time Israel has legal sovereignty over West Jerusalem while Jordan has legal sovereignty over East Jerusalem thereby ending any claim that the United Nations has to the city. However, if the armistice does not constitute the transfer of legal sovereignty then the United Nations retains their claim and at this point Israel and Jordan are merely legal occupants of the city. A possible answer to this question came during the same year as the armistice. United Nations General Assembly Resolution 194 was passed on December 11, 1948, and called for the demilitarization of Jerusalem along with UN control over the city and free access for all to the city and the holy places throughout the region. The section referring to UN control over Jerusalem reads:

The General Assembly establishes a Conciliation Commission consisting of three States members of the United Nations which shall have the following functions: Resolves that, in view of its association with three world religions, the Jerusalem area, including the present municipality of Jerusalem plus the surrounding villages and towns, the most eastern of which shall be Abu Dis; the most southern, Bethlehem; the most western, Ein Karim and the most northern, Shu'fat, should be accorded special and separate treatment from the rest of Palestine and should be placed under effective United Nations control.⁴²

Since the United Nations never officially signed over control of any part of the city to either the Israelis or the Jordanians than based on resolution 194 they still maintained legal sovereignty and apparently had every intention of placing the city of Jerusalem under international control.

⁴² *United Nations Information System on the Question of Palestine* (2011), <http://unispal.un.org/UNISPAL.NSF/0/C758572B78D1CD0085256BCF0077E51A>.

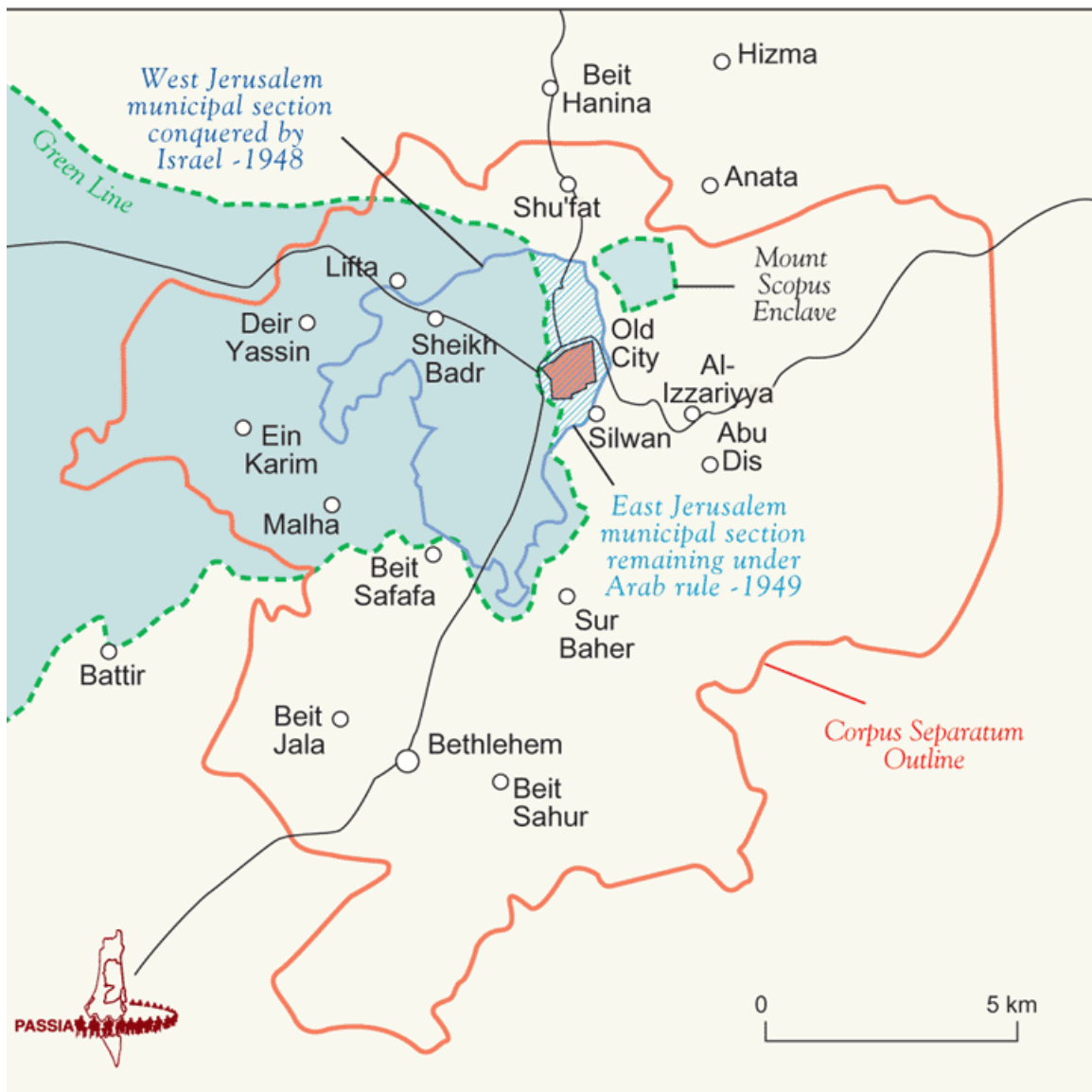


Figure 2. Corpus Separatum Outline⁴³

⁴³ Passia, "Corpus Separatum," *Palestinian Academic Society for the Study of International Affairs* (2011), http://www.passia.org/palestine_facts/MAPS/images/jer_maps/UNPartition.html.

2. The Middle Years

After the completion of the armistice there was little talk at the United Nations about internationalizing the city of Jerusalem but the UN did manage to pass another resolution in 1949. United Nations General Assembly resolution 303 passed on December 9, 1949, reiterated the stance taken in resolutions 181 and 194. Resolution 303 reads, “The General Assembly decides to restate, therefore, its intention that Jerusalem should be placed under a permanent international regime, which should envisage appropriate guarantees for the protection of the Holy Places, both within and outside Jerusalem, and to confirm specifically the provisions of General Assembly Resolution 181.”⁴⁴ However, this was the only resolution that came about during interwar period and aside from this there was little follow-up or progress on the creation of an international regime to govern the city of Jerusalem. In fact it appears that the idea of internationalizing Jerusalem was all but forgotten by 1952 and the United Nations was willing to allow the current controlling parties to remain in place and provide protection for the holy places within and around the city.⁴⁵

While the United Nations may have been content to remain quiet on the subject the two parties involved in and around Jerusalem were still very hostile towards each other. In many cases access to the holy places was not free and available to everyone as the UN Resolutions had required and at times it actually become completely restricted for varying reasons. Even with persistent problems in the region the issue of Jerusalem, and all of Palestine for that matter, would not be revisited until 1967. This lack of action is seen by some as evidence that the United Nations had given up all claims to Jerusalem and therefore sovereignty at this point falls to the two occupying forces of Israel and Jordan. Lauterpacht for example states that “the U.N. by its unconcern with the idea of territorial internationalization, as demonstrated from 1952 to 1967, effectively acquiesced

⁴⁴ *United Nations Information System on the Question of Palestine* (2011), <http://unispal.un.org/unispal.nsf/9a798adbf322aff38525617b006d88d7/2669d6828a262edb852560e50069738a?OpenDocument&Highlight=0,resolution,303>.

⁴⁵ Elihu Lauterpacht, *Jerusalem and the Holy Places* (London: Anglo-Israeli Association, n.d.), 33.

in the demise of the concept.”⁴⁶ I disagree with Lauterpacht’s conclusion for one major reason. The lack of action does not legally equate to the transfer of sovereignty for a city, state, region, or anything for that matter. According to International Law and the Fourth Geneva Convention, there must be some type of action confirming the transfer of control in order for it to be legally binding. Therefore, at this point it appears that the United Nations maintains legal sovereignty over the city of Jerusalem.

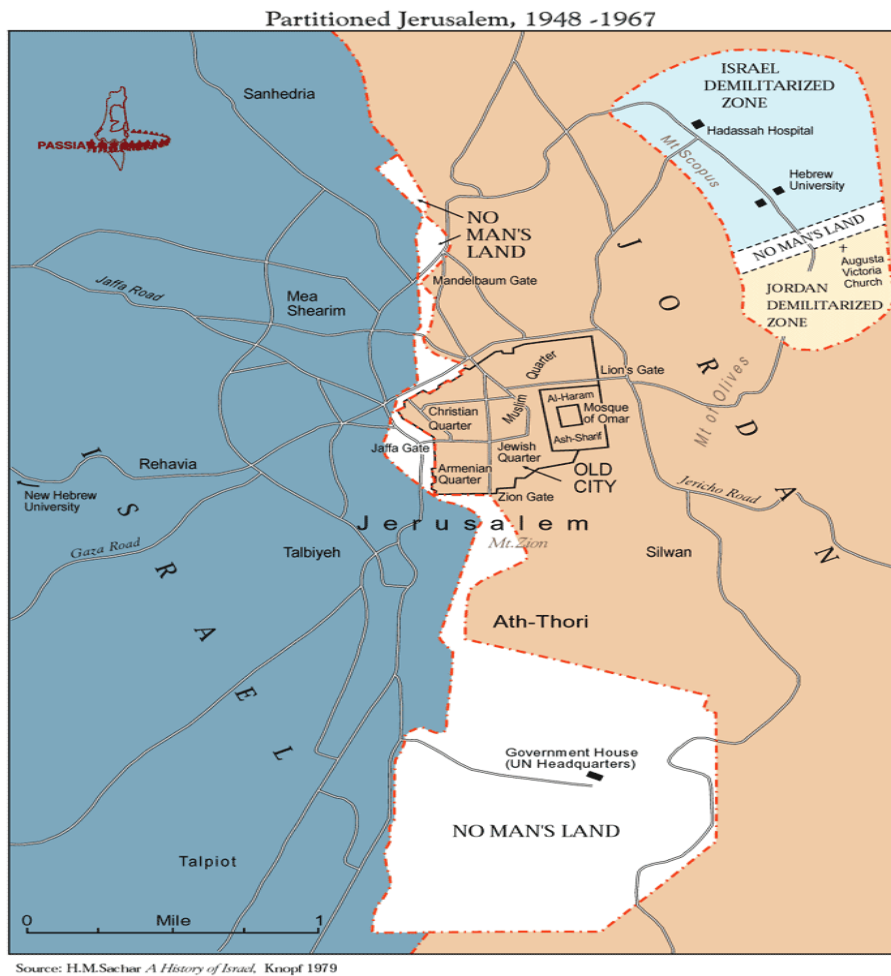


Figure 3. Partitioned Jerusalem⁴⁷

⁴⁶ Elihu Lauterpacht, *Jerusalem and the Holy Places* (London: Anglo-Israeli Association, n.d.), 36.

⁴⁷ Passia, "Partitioned Jerusalem," *Palestinian Academic Society for the Study of International Affairs* (2011), http://www.passia.org/palestine_facts/MAPS/images/jer_maps/PartitionedJerusalem.html.

3. The Second Arab-Israeli War

In 1967, the Arab countries began building up their military forces due to the belief that the Israelis were doing the same. By June of 1967 the armies of Syria, Jordan, Iraq, and Egypt had forces along the Israeli border. On June 5, 1967, due to the fear of being attacked on all fronts Israel launched a massive surprise air attack against Egypt's air forces in an act deemed to be self-defense. This attack gave Israel air superiority and left the Arab ground forces without air support. Arab forces were able to push back Israeli forces in Jerusalem but this victory was short lived and by the end of the second day Jordan had been driven out of Jerusalem and most of the West Bank.⁴⁸ The war, later to be known as the Six Day War, ended on June 10, 1967, with Israel possessing a much larger portion of the region and the entire city of Jerusalem. Shortly after the war concluded the Knesset passed three laws, two of which were pertaining to the administration and control of Jerusalem. The first stated that Israeli law, jurisdiction, and administration should be extended to all portions of the biblical Israel, or Eretz Israel, while the second allowed for the enlargement of certain municipalities.⁴⁹ These two laws allowed Israel to bring East Jerusalem and Old City under their control and unify them with West Jerusalem. However, these laws have no meaning if Israel does not have legal sovereignty over the city and it appears that they do not. Lapidoth points out that "if Jordan acquired sovereignty over East Jerusalem by virtue of the principal of self-determination, Israel has been a belligerent occupant in those sectors. If Israel was the aggressor in 1967, it has been an illegal occupant, but if Israel has occupied the area in an act of self-defense, it has been a lawful occupant. The corpus separatum theory was not affected by war."⁵⁰ Therefore, nothing had changed with the status of Jerusalem and the United Nations may still have had a legal claim to the city at that time.

⁴⁸ Elihu Lauterpacht, *Jerusalem and the Holy Places* (London: Anglo-Israeli Association, n.d.), 34.

⁴⁹ Julius Stone, *Israel and Palestine* (Baltimore: The Johns Hopkins University Press, 1981), 111.

⁵⁰ Ruth Lapidoth, "Jerusalem: Some Legal Aspects," In *Jerusalem A City and Its Future*, by Marshall Breger and Ora Ahimeir (Syracuse: Syracuse University Press, 2002), 74.

In July 1967, the U.N. General Assembly adopted a resolution that considered Israel's actions to change the status of Jerusalem invalid.⁵¹ The resolution reads, "Deeply concerned at the situation prevailing in Jerusalem as a result of the measures taken by Israel to change the status of the City, the General Assembly considers that these measures are invalid and calls upon Israel to rescind all measures already taken and to desist forthwith from taking any action which would alter the status of Jerusalem"⁵² From this statement it becomes obvious that the United Nations considers Israel merely a legal occupant in east Jerusalem and nothing more. A few months after this on November 22, 1967, the United Nations Security Council passed resolution 242, which again called for the withdrawal of Israeli forces and the termination of all claims or states of belligerency.

Since the end of the 1967 war and the resolutions that developed out of that conflict, there has been little done that could be considered to have any effect on the status of legal sovereignty over Jerusalem. There have been many attempts to bring about a peaceful resolution over the status of Jerusalem and some have included the possibility of again separating the city into east and west thereby allowing both the Israelis and Palestinians to claim it as their capital but they have all come to a standstill. While there have been no major developments regarding the United Nations' legal status over the city, there have been a few points worth noting. First, on December 17, 1981, the United Nations General Assembly passed resolution 36/226 which declared that Israel must withdraw from Jerusalem and condemns Israel's occupation of Jerusalem which was against the United Nations Charter. On December 16, 1982, and December 11, 1984, the General Assembly passed resolutions 37/123 and 39/146, respectively, which reiterated and reaffirmed the resolution passed in 1981.⁵³ This effectively marks the end of resolutions passed by the General Assembly regarding Jerusalem and while they are minor they do provide some evidence that the United Nations is still attempting to execute its sovereignty over the city.

⁵¹ Elihu Lauterpacht, *Jerusalem and the Holy Places* (London: Anglo-Israeli Association, n.d.), 34.

⁵² *United Nations Information System on the Question of Palestine* (2011), <http://unispal.un.org/UNISPAL.NSF/0/A39A906C89D3E98685256C29006D4014>.

⁵³ *United Nations Information System on the Question of Palestine* (2011), <http://unispal.un.org/UNISPAL.NSF/0/B64C09EBE485BA88852560D900598A86>.

Second, on October 26, 1994, the Israel-Jordan Peace Treaty was signed. While this peace treaty does not affect the United Nations' claim to Jerusalem it may remove the legal argument of another party because it can be argued that Jordan relinquishes its claim during this peace process. The treaty reads that "the boundary, as set out in this agreement, is the permanent, secure and recognized international boundary between Israel and Jordan, without prejudice to the status of any territories that came under Israeli military government control in 1967."⁵⁴ This effectively indicated that Jordan recognized the borders held by Israel at that time which would include the city of Jerusalem and the surrounding area. This peace treaty and the status of Jordan's claim are discussed further in the chapter covering Jordan.

Even with the possibility that Jordan's claim is no longer legal thereby narrowing the field of competing claims the United Nations has failed to act to increase its own claim to legal sovereignty. Lauterpacht points out that "the proposal for the internationalization of Jerusalem has never assumed the dimensions of a legally binding obligation. The proposal represented the United Nations' assessment of one element in the creation of a viable future for a divided Palestine."⁵⁵ It must be again pointed out that since the United Nations has never officially relinquished sovereignty over the city it can be seen that their claim to it is justified by an uninterrupted chain of legal control dating back to the end of the Ottoman Empire despite claims by the Israelis, Palestinians, and Jordanians. However, even though the United Nations never officially relinquished control it failed to take steps to prove its own sovereignty and has actually passed resolutions that indicate a desire to be removed from the situation.

⁵⁴ *Israel Ministry of Foreign Affairs* (2008), <http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/Israel-Jordan%20Peace%20Treaty>.

⁵⁵ Elihu Lauterpacht, *Jerusalem and the Holy Places* (London: Anglo-Israeli Association, n.d.), 20.

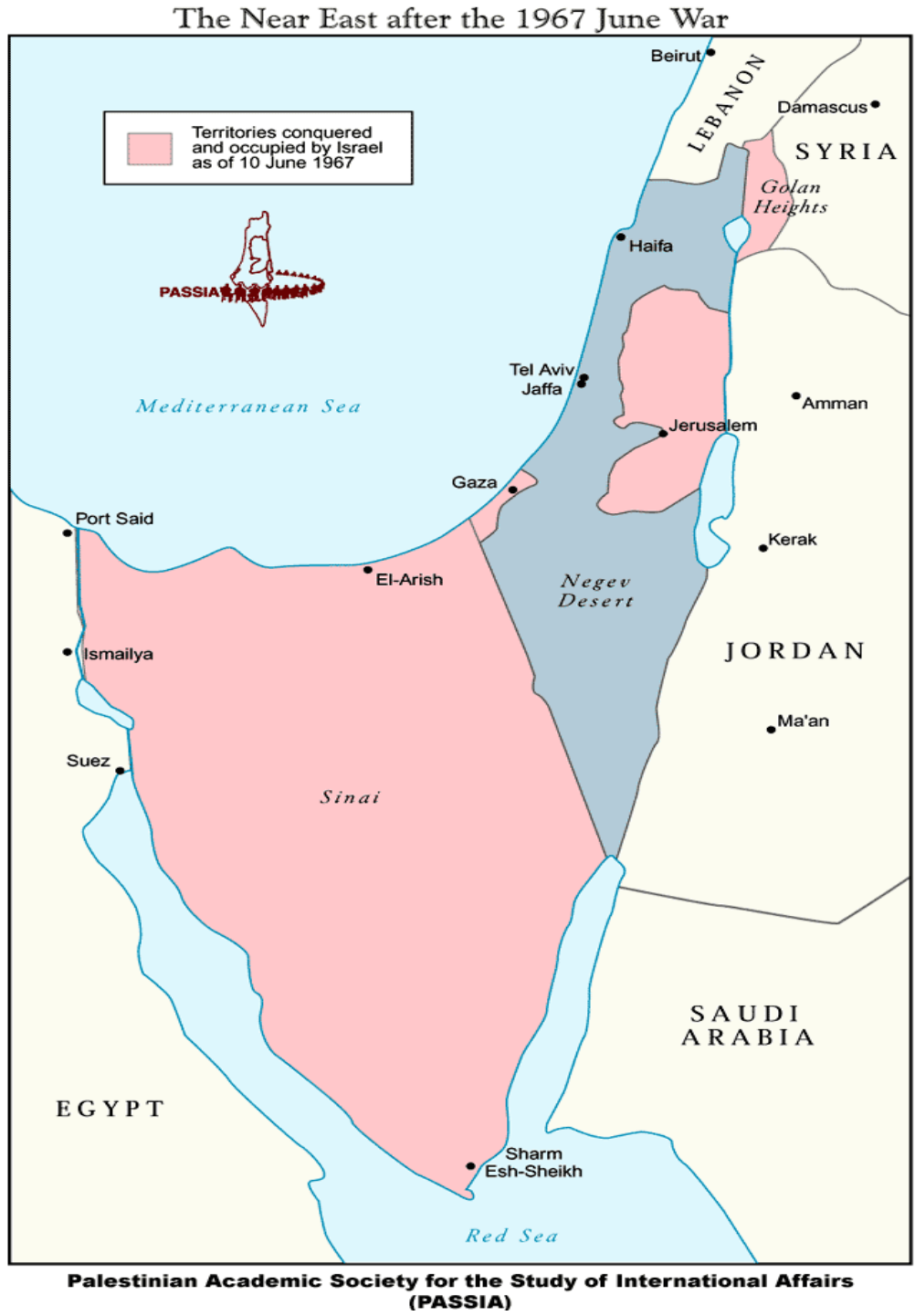


Figure 4. Post-1967 War⁵⁶

⁵⁶ Passia, "The Near East After the 1967 War," *Palestinian Academic Society for the Study of International Affairs* (2011), http://www.passia.org/palestine_facts/MAPS/1967-post-june-war-israel.html.

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III. ISRAEL'S CLAIM TO JERUSALEM

A. EARLY HISTORY

1. The Balfour Declaration

The second school of thought is that Israel has legal sovereignty over both West and East Jerusalem and that a united Jerusalem is the eternal capital of Israel. It is important to point out that this claim is not supported by any other country in the world and that most countries, along with the United Nations and the European Union, consider Israel's presence in East Jerusalem to be that of a belligerent occupant. Nevertheless Israel maintains its claim to both East and West Jerusalem but for different reasons. In order to understand Israel's claim to Jerusalem it is necessary to start with the formation of the Jewish state.

On November 2, 1917, an agreement known as the Balfour Declaration was struck between Britain and the Zionists allowing for the establishment of a Jewish state in Palestine. This agreement, which was seen as advantageous to both the Zionists and the British because it would provide a home for the Jews and give Britain a strong ally in the region, was incorporated as an objective in the League of Nations mandate for Palestine.⁵⁷ The Balfour Declaration allowed for the massive immigration of roughly 70,000 Jews to enter into the region and therefore provided the driving force necessary to establish a Jewish state. However, the state was not officially declared at this point nor did the mandate include any part of Jerusalem. In fact the declaration does not establish any borders at all and was initially nothing more than a means of bringing Jews to the area. But it was this population boom that enabled the start of the Jewish sovereignty claim over Jerusalem. After the 1917 declaration, the population of Jerusalem rose until the Zionists made up the majority within the city which allowed them to gain a foothold and helped to lay the foundation for their modern day claim to West Jerusalem. Further, the Israelis consider their occupation of and claim to the city to be lawful because the

⁵⁷ Henry Cattan, "Jerusalem: Israeli Concepts, Policies and Practices," In *Israeli Settlements in the Occupied Arab Territories* (Dar Al-Afaq Al-Jadidah, 1985), 126.

declaration was incorporated into the mandate. Bradley points out that “the essence of the Jewish argument is that at the time the mandate was issued, the judgment to create a Jewish home was rendered by the highest international authority that than existed, and that this judgment was made with the concurrence of all of the enlightened nations of the world.”⁵⁸ So, at this early stage, Israel is basing its claim to sovereignty over the city of Jerusalem on the legality of the mandate and world recognition of a Jewish state. But this claim appears to be difficult to justify since there were never any provisions for the creation of a Jewish state within the declaration or the mandate and therefore the claim seems to lack any real validity.

2. The 1948 War and the Green Line

On November 29, 1947, the United Nations General Assembly adopted resolution 181, which called for the termination of the mandate and the partition of Palestine into two states. Resolution 181 was accepted by the Jewish community but rejected by the Arabs because they considered it to be an infringement on the rights of the Arab people of Palestine. The passing of this resolution quickly led to Arab attacks on Jewish towns and villages throughout the region.⁵⁹ However, despite these attacks the Jewish community declared Israel to be an independent nation on May 14, 1948, referencing resolution 181 as its basis for sovereignty.⁶⁰ The very next day, May 15, 1948, the Arab armies of Egypt, Iraq, Lebanon, Syria, and Jordan invaded the newly established state thereby starting the first Arab-Israeli War. The war lasted for just eight months ending on 6 January 1949, but during that brief time the Israeli defense force was able to take control of West Jerusalem while the Jordanian army continued to hold East Jerusalem and the Old City. A divided city was created when the two sides reached an armistice which established a border for the Israeli and Palestinian states known as the Green Line. The Green Line separated not only Israeli occupied West Jerusalem from East Jerusalem

⁵⁸ Christopher Bradley, *The International Legal Status of Jerusalem* (Master’s thesis, St. John’s University, 1981), 75.

⁵⁹ Ruth Lapidot “Jerusalem: Some Legal Aspects,” In *Jerusalem A City and Its Future*, by Marshall Breger and Ora Ahimeir (Syracuse: Syracuse University Press, 2002), 65.

⁶⁰ John Quigley, “Jerusalem West and East: The Question of Sovereignty,” *The American Committee on Jerusalem*. Occasional Paper Series, (1996), 1.

but also the entire Jewish state from the Arab territories.⁶¹ But this line was not intended to establish any permanent territories it was established in order to provide a border for military forces and nothing more. Sections 8 and 9 of Article VI read as follows:

8. The provisions of this article shall not be interpreted as prejudicing, in any sense, an ultimate political settlement between the parties to this agreement.

9. The Armistice Demarcation Lines defined in this agreement are agreed upon by the parties without prejudice to future territorial settlements or boundary lines or to claims of either party relating thereto.⁶²

Therefore, by design, the establishment of the Green Line between the Israeli and Arab forces should not be seen as or used for any form of legal authority for any border, region, or city. For this reason the Israelis have not attempted to use this agreement as a basis for any claim to the city of Jerusalem, but they did continue lay claim to the city through other means.

After the 1948 War, Israel continued to base its claims of sovereignty over West Jerusalem on the British Mandate and the promise to establish a Jewish home state in the region. Bradley confirms this point by stating that, “under the League of Nations Mandate, Britain had accepted the responsibility of facilitating and establishing the Jewish National Home.”⁶³ In addition, Israel justifies its claim by arguing that sovereignty over West Jerusalem fell to them after the mandate ended “because Britain’s withdrawal left no sovereignty in Jerusalem, making it open to occupation by others. Thus, territory that Israel occupied in Palestine fell under its sovereignty by virtue of occupation.”⁶⁴ Israel would later use this same argument in East Jerusalem after the

⁶¹ Maya Choshen, “Jerusalem in Our Time: Past, Present, and Future,” In *Jerusalem A City and Its Future*, by Marshall Breger and Ora Ahimeir (Syracuse: Syracuse University Press, 2002), 20.

⁶² “Israel-Jordan Armistice Agreement,” Israel Ministry of Foreign Affairs 2008, <http://www.mfa.gov.il/MFA/Foreign%20Relations/Israels%20Foreign%20Relations%20since%201947/1947-1974/Israel-Jordan%20Armistice%20Agreement>.

⁶³ Christopher Bradley, *The International Legal Status of Jerusalem*, Master’s Thesis (St. John’s University, 1981), 26.

⁶⁴ John Quigley, “Sovereignty in Jerusalem,” *The Catholic University of America Law Review: Vol 45*, (1996), 768.

Jordanian Army withdrew from that portion of the city. Further, on December 12, 1949, in order to solidify their claim to sovereignty “Prime Minister David Ben-Gurion of Israel announced in the Knesset that Jerusalem was an inseparable part of Israel and its Eternal Capital. The Knesset approved the position.”⁶⁵

Between the years of 1949 and 1967, the United Nations passed just one resolution regarding the status of Jerusalem. Resolution 303 passed on December 9, 1949, simply restated the original idea that Jerusalem should be a city placed under an international regime but it did not set forth any plans for doing so nor did it condemn Israel for its occupation of West Jerusalem. The resolution reads; “The General Assembly decides to restate its intention that Jerusalem should be placed under a permanent international regime, which should envisage appropriate guarantees for the protection of the Holy Places, both within and outside Jerusalem, and to confirm specifically the provisions of General Assembly Resolution 181.”⁶⁶ But as time went on, the United Nations failed to follow-up on the creation of an international regime or make any attempt to enforce the idea and by 1952 it appears that the idea was forgotten and that many were willing to allow the current controlling parties to remain in place.⁶⁷ This failure by the United Nations to act in any capacity during this time period further diminished the idea that it had any control over the city. Further, if the United Nations did have sovereignty over the city during this time period than its actions were that of an absentee landlord at best. At worst, it was enough to provide evidence that it had given up its claim to the city and was content in allowing sovereignty to fall to the two occupying powers. Therefore, it is possible to understand the claim that Israel makes towards West Jerusalem during this time. However, it is necessary to point out that if sovereignty of West Jerusalem falls to Israel then sovereignty of East Jerusalem must fall to Jordan during this crucial period.

⁶⁵ John Quigley, “Sovereignty in Jerusalem,” *The Catholic University of America Law Review: Vol 45*, (1996), 768.

⁶⁶ *United Nations Information System on the Question of Palestine* (2011), <http://unispal.un.org/unispal.nsf/9a798adbf322aff38525617b006d88d7/2669d6828a262edb852560e50069738a?OpenDocument&Highlight=0,resolution,303>.

⁶⁷ Elihu Lauterpacht, *Jerusalem and the Holy Places* (London: Anglo-Israeli Association, n.d.), 33.

3. The 1967 War

Despite the willingness of the United Nations to continue accepting the presence of occupying forces in Jerusalem there was still conflict over the city. The conflict was waged between Israel trying to establish itself and defend its borders and an Arab community wishing to expel an outsider while reclaiming land and returning refugees to their homes. These competing views came to a head and resulted in the Six Day War. In May 1967, the armies of Egypt, Syria, Jordan, and Iraq amassed troops on the Israeli border in preparation for a possible war but may never have had any intention of attacking. This becomes evident because the moment the troops were in position Nasser began challenging Israel on a regular basis in an attempt to get them to strike first.⁶⁸ This strategy appears to have worked because Israel could not sit idly by and wait for an attack that could prove devastating at the hands of such a large number of forces. For this reason, Israel decided to launch an assault against Egypt's air forces on the June 5, 1967. Israel's assault successfully destroyed the majority of Egypt's air forces while they were still on the ground. Also on June 5, 1967, the Israeli Prime Minister sent a message to the King of Jordan, King Hussein, in an attempt to avoid a conflict in and around Jerusalem. The message reads; "We are engaged in defensive fighting in the Egyptian sector, and we shall not engage ourselves in any action against Jordan, unless Jordan attacks us. Should Jordan attack Israel, we shall go against her with all our might."⁶⁹ Jordan was reluctant to attack and this message gave them further reason to pause but after Egypt convinced them that they had conducted a successful assault Jordan entered the war and immediately began shelling Tel Aviv and West Jerusalem. Despite being outnumbered and surrounded, Israeli forces had the advantage, and without air coverage the Arab ground forces were susceptible to Israeli air attacks, which proved to be effective. Due in part to this advantage the war ended after just six days, on June 10, 1967. During these six, days Israeli forces were successful in driving Arab forces out of Jerusalem allowing them to occupy the entire city with all of its holy places.

⁶⁸ Mitchell Bard, *Jewish Virtual Library* (2008),
http://www.jewishvirtuallibrary.org/jsourc/History/67_War.html.

⁶⁹ Levi Eshkol, *Jewish Virtual Library* (June 5, 1967),
<http://www.jewishvirtuallibrary.org/jsourc/History/husslet.html>.

After taking control of Jerusalem the Israeli government almost immediately began making changes in order to unite the city. “Protest came from Jordan and other Arab and non-Arab states that international law had been violated by Israel while Israel asserted that Jordan was responsible for initiating the attack on Jerusalem and must accept the consequences. The Israeli foreign minister stated on June 19, 1967, that Jordan was given every opportunity to stay outside the struggle”⁷⁰ Aside from the hard-line approach of blaming Jordan for the status of Jerusalem, Israel argued that these changes were necessary for maintaining the city and that international law and the Geneva Conventions were not being violated because they were doing it out of necessity for the good of the city and not in an attempt to gain sovereignty over it. Nevertheless, the United Nations protested the changes being made by Israel stating that any changes to another country’s sovereign territory during occupation was a form of annexation and was therefore in violation of international law. “In July 1967, the Israeli minister of foreign affairs Abba Eban informed the UN in writing that their actions did not constitute annexation but only administrative and municipal integration.”⁷¹ However, without an official annexation the city of East Jerusalem would never fall under Israel’s legal sovereignty. Therefore, in order to have legal claim over all of Jerusalem it would be necessary for Israel to officially annex the city at some point in time.

B. RECENT YEARS

Since the end of the 1967 War there has been little change in the status of Jerusalem. Israel has continued to occupy East Jerusalem despite international outcry for the removal of their forces and an end to settlement building around the city. While the world has continued to protest the occupation Israel has been working on changing its status in the city from occupant to sovereign. The Israeli government went beyond occupation and actually increased their legal claim to the city by introducing the Basic Law. “On 30 July 1980, the Knesset adopted this new law concerning Jerusalem which

⁷⁰ John Moore, *The Arab-Israeli Conflict*, vol. 1 (Princeton: Princeton University Press, 1974), P. 916 as seen in Bradley, Christopher. *The International Legal Status of Jerusalem*, Master’s Thesis (St. John’s University, 1981).

⁷¹ Ruth Lapidot, “Jerusalem: Some Legal Aspects.” In *Jerusalem A City and Its Future*, by Marshall Breger and Ora Ahimeir (Syracuse: Syracuse University, 2002), 69.

states: Jerusalem Capital of Israel. This law states that Jerusalem, complete and united, is the capital of Israel and it is the seat of the President, the Knesset, the Government, and the Supreme Court.”⁷² This law effectively marks the full annexation of the city by Israel and the official announcement of such since it was publically passed by the Knesset, although it has never been brought to the United Nations. This step has been noted by some as the final one that had to occur in order for East Jerusalem to officially and legally become a part of Israel. In addition to this “Israel’s Supreme Court has held in a number of decisions that under Israeli law the eastern sectors of Jerusalem had become part of the State of Israel.”⁷³ These actions are not supported by the international community and “to date, foreign states have not recognized any sovereignty over Jerusalem, but they have acquiesced in de facto Israeli control over West Jerusalem, while claiming that East Jerusalem is occupied territory. For the Israeli authorities, the whole of Jerusalem is part of the State of Israel.”⁷⁴ This is an important point because while many dispute Israel’s claim to East Jerusalem most of the international community has recognized Israel’s sovereignty over West Jerusalem to this point. In addition to the Knesset passing a ruling on Israel’s claim to Jerusalem the Israeli Supreme Court also passed a similar ruling about thirteen years later. “In 1993 the Israeli Court ruled in a case that the Temple Mount is part of the territory of the State of Israel and that the sovereignty of the state extends over unified Jerusalem in general and over the Temple Mount in particular.”⁷⁵ This ruling has also received international protest but despite this it does mark another step in Israel’s claim to sovereignty.

Up to this point, Israel has sought unify all of Jerusalem, along with the surrounding area, and have its claim to legal sovereignty over the city recognized. The most difficult aspect of this is its claim to East Jerusalem. The fact that East Jerusalem

⁷² Ruth Lapidoth, “Jerusalem: Some Jurisprudential Aspects,” *Catholic University Law Review*, (1996), 670.

⁷³ Ruth Lapidoth, “Jerusalem: Some Legal Aspects,” In *Jerusalem A City and Its Future*, by Marshall Breger and Ora Ahimeir (Syracuse: Syracuse University Press, 2002), 69.

⁷⁴ Ruth Lapidoth, “Jerusalem: Some Legal Aspects,” In *Jerusalem A City and Its Future*, by Marshall Breger and Ora Ahimeir (Syracuse: Syracuse University Press, 2002), 89.

⁷⁵ Ruth Lapidoth, “Jerusalem: Some Legal Aspects,” In *Jerusalem A City and Its Future*, by Marshall Breger and Ora Ahimeir (Syracuse: Syracuse University Press, 2002), 77.

was occupied by Arabs prior to the 1967 War and since that time almost every country in the world has considered Israel's presence there to be that of a belligerent occupant means there is little justification for a change in sovereignty other than Israel's own government rulings. Because of this point it is safe to say that legally, "the controversy over the future of Jerusalem generally is restricted to control over East Jerusalem. Almost all parties involved agree that West Jerusalem should remain under Israeli control."⁷⁶ However, even if many agree that Israel should continue to control West Jerusalem, is there any legal backing for it? The answer is yes and it comes from the ideas that surround cease fire agreements and the prospects of internationally recognized borders developing out of them, especially when there is little protest against it.

After the First Arab-Israeli War and the ceasefire resulting in The Green Line there was a reasonable expectation that Israel should have become the legal sovereign of West Jerusalem. This is born out of International Law and the idea that a ceasefire agreement, if in place long enough, will develop into an actual border for the countries involved. Before the 1967 War Israel had been in West Jerusalem for almost twenty years and during that time Israel made significant administrative and territorial improvements to the city with relatively little protesting from the Arab community. It could be argued that the period between 1949 and 1967 was the most peaceful in Jerusalem since the Ottoman Empire. In addition, this same time period saw the fewest number of resolutions passed by the United Nations regarding the status of Jerusalem. Further, International Law dictates that no occupied territory may be annexed so long as the occupied continue to protest against the occupation but as mentioned earlier this period saw relatively few complaints. Finally, if it were to be decided that Israel has no legal right to West Jerusalem then it would also hold true that Jordan never had any legal right to East Jerusalem leaving legal sovereignty to the United Nations. Therefore, there is sufficient legal justification for Israel to claim sovereignty to West Jerusalem but its claim to East Jerusalem is less convincing and appears to have little legal backing.

⁷⁶ Moshe Hirsch, "The Future Negotiations Over Jerusalem, Strategic Factors and Game Theory," *The Catholic University of America Law Review: Vol 45*, 1996, 700.

IV. THE ARAB CLAIM TO JERUSALEM

A. JORDAN'S CLAIM

1. Early History

The third school of thought is that Jordan has legal sovereignty over East Jerusalem. This claim evolved out of the termination of the British Mandate in a similar fashion to Israel's claim over West Jerusalem. After the British left the region in 1948 both the Arabs and the Israelis felt the United Nations left with them effectively bringing an end to the mandate. It was believed that the end of the mandate with no final resolution left a void of sovereignty. This void was filled at the conclusion of the first Arab Israeli War which saw Israel in control of West Jerusalem while East Jerusalem fell to Jordan.

The first Arab Israeli war began on May 15, 1948. Within the first few hours of the war Israel took control of West Jerusalem and moved against The Old City and East Jerusalem. "Between May 15 and 18, 1948, the Israelis attacked Old City but the Palestinians were able to repel the Jewish attacks and on the 19th of May, Jordan's regular army entered the city. The Old City remained in the hands of Jordan until 1967."⁷⁷ The war ended on March 10, 1949, with the establishment of the Green Line which separated Israeli and Arab forces between West and East Jerusalem. Shortly after the Green Line was established it became relatively clear that the armies' locations at that time would become the permanent borders between Israel and Jordan. "The partition of Jerusalem seemed to become an established, if not legal fact of life. Neither Jordan nor Israel seemed to be particularly dissatisfied"⁷⁸ and within a few months of the armistice and the establishment of the Green Line both parties began to lay claim to their new territory.

⁷⁷ Henry Cattán, "Jerusalem: Israeli Concepts, Policies and Practices," In *Israeli Settlements in the Occupied Arab Territories* (Dar Al-Afaq Al-Jadidah, 1985), 128.

⁷⁸ Eugene Bovis, *The Jerusalem Question, 1917-1968* (Stanford: Hoover Institution Press, 1971): 99 as seen in Christopher Bradley, *The International Legal Status of Jerusalem* (Master's thesis, St. John's University, 1981), 52.

In 1949, arrangements were made to annex the West Bank and the eastern portion of Jerusalem to Jordan.⁷⁹ This act was completed with almost no resistance from the Israelis or the international community. Israel in turn annexed their newly acquired territories including West Jerusalem and “on January 23, 1950, the Knesset proclaimed West Jerusalem the capital of Israel. East Jerusalem was officially absorbed by Trans-Jordan in late 1950.”⁸⁰ The difference between the two is the fact that the occupying force in West Jerusalem, the Israelis, annexed their territory without the consent of the occupied while exactly the opposite happened in East Jerusalem. “In 1950, a conference of dignitaries from areas conquered by Jordan in 1948 convened in Jericho. The participants expressed their wish to be part of Jordan, and consequently the king of Jordan and the Jordanian Parliament proclaimed the annexation of the West Bank, including East Jerusalem, to the kingdom.”⁸¹ In a sense the Palestinians were using self-determination in order to identify themselves with the Jordanians.

2. Jordan Gains Sovereignty

The right to self-determination is an important point for this argument. “The right to self-determination is the right of a people to determine its own destiny. In particular, the principle allows a people to choose its own political status and to determine its own form of economic, cultural and social development.”⁸² The idea of self-determination is allowed in International Law. Article 1 Paragraph 2 of the United Nations Charter states that one of its purposes is “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.”⁸³ In addition to this, The United

⁷⁹ Riziq Shuqair, *Jerusalem: Its Legal Status and the Possibility of a Durable Settlement* (Ramallah: Al-Haq, 1996), 5.

⁸⁰ Christopher Bradley, *The International Legal Status of Jerusalem* (master’s thesis, St. John’s University Press, 1981), 49.

⁸¹ Ruth Lapidot, “Jerusalem: Some Legal Aspects,” In *Jerusalem A City and Its Future*, by Marshall Breger and Ora Ahimeir (Syracuse: Syracuse University Press, 2002), 66.

⁸² *Unrepresented Nations and Peoples Organization*. (July 19, 2006), <http://www.unpo.org/article/4957>

⁸³ “Charter of The United Nations,” The United Nations 2012, <http://www.un.org/en/documents/charter/index.shtml>.

Nations International Covenant on Civil and Political Rights states in Article 1 Paragraph 1 that “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”⁸⁴ From these points, it is clear that the Palestinians had every right to declare themselves and their territory part of Jordan as long as Jordan was willing to accept, which it did by annexing The West Bank and East Jerusalem.

The idea of self-determination was brought up before the Palestinians were annexed by Jordan. In fact the topic was broached prior to the First Arab Israeli War when the United Nations determined it to be a possible solution for Jerusalem. “The notion of self-determination was included in the Trusteeship Council Statute for Jerusalem in 1948. The statute deferred the right of self-determination for ten years, at which time the residents of Jerusalem were able to decide by referendum what modification of the international regime they might wish to have introduced.”⁸⁵ A ten-year period would have come to an end in 1958 while Jordan still had control which would make it the legal sovereign of East Jerusalem and The Old City not only for the reason of occupation and the establishment of the Green Line but also for the reason of self-determination. In addition to these points there is another reason for recognizing Jordan as the legal sovereign of East Jerusalem. “The territorial integrity of the State of Israel was recognized by the United Nations when it became a member of that international organization on May 11, 1949. At the same time, the state of Israel accepted the territorial integrity of the other member states of the United Nations.”⁸⁶ Jordan joined the United Nations on December 14, 1955, and at that time Jordan’s territory included the West Bank and East Jerusalem. Because of this Israel is required under the United Nations Charter to recognize Jordan’s sovereignty claim to East Jerusalem and the entire West Bank.

⁸⁴ *Office of The United Nations High Commissioner for Human Rights*, (March 26, 1976), <http://www2.ohchr.org/english/law/ccpr.htm>.

⁸⁵ Christopher Bradley, *The International Legal Status of Jerusalem* (master’s thesis, St. John’s University, 1981), 75.

⁸⁶ Christopher Bradley, *The International Legal Status of Jerusalem* (master’s thesis, St. John’s University, 1981), 56.

Now, as mentioned before, there is the argument that the end of the British Mandate left a void of sovereignty in the region and further there are some that argue that “Jordan could not fill the gap in sovereignty because it occupied East Jerusalem by an illegal act of aggression.”⁸⁷ But if this is true than this would also make Israel’s occupation of West Jerusalem, at that time and East Jerusalem today, an illegal act of aggression. Furthermore, even if Jordan’s occupation was an illegal act of aggression it was made legal by the afore mentioned right of self-determination of the Palestinians and their desire to become part of Jordan. In addition, Quigley points out that “the mandate was a trustee and was beneficial to the title holder. Therefore, Britain’s departure left control to the citizens of that territory.”⁸⁸ Since the mandate ended on the eve of the 1948 war and Britain was in the process of withdrawing upon its outbreak then there was no void of sovereignty for either Israel or Jordan after the first Arab-Israeli War. In a final act to establish its sovereignty “Jordan declared in 1960 that Jerusalem was one of the two capitals of the Kingdom, and the Western powers duly protested.”⁸⁹ It is important to note that the Western powers have protested against both Israel and Jordan for placing their capitals in Jerusalem but they did not protest against Israel for occupying West Jerusalem while they did protest Jordan and its claim to East Jerusalem.

3. East Jerusalem in Dispute

Jordan maintained control of East Jerusalem until the end of the Six Day War in 1967, when Israel pushed Jordanian forces from the city and occupied it. The Six Day War began because of a buildup of Arab forces along the Israeli border and a need for Israel to defend itself. Initially Israel claimed that they were attacked first but “in July of 1967, Israel’s prime minister admitted that Israel struck first claiming it acted in legitimate defense, expecting an imminent Egyptian attack. However, other Israeli leaders who were present at the June 4th cabinet meeting contradicted the prime minister,

⁸⁷ Ruth Lapidot, “Jerusalem: Some Jurisprudential Aspects,” *Catholic University Law Review*, (1996), 673.

⁸⁸ John Quigley, “Sovereignty in Jerusalem,” *The Catholic University of America Law Review: Vol 45*, 1996: 768.

⁸⁹ Christopher Bradley, *The International Legal Status of Jerusalem*, Master’s Thesis, (St. John’s University, 1981), 52.

saying that it was understood at the meeting that Egypt was not about to attack.”⁹⁰ This is an important point because “International Law in Article 51 permits self-defense to resist armed attack but since Israel used a pre-emptive strike in 1967, and suffered no actual armed attack, the claims Israel makes cannot be substantiated in International Law.”⁹¹ Therefore, any claim that Israel makes about sovereignty over East Jerusalem out of self-defense is unfounded. However, this did not stop Israel from advancing its claim over the entirety of Jerusalem and its surrounding areas.

Israel began expanding East Jerusalem’s territory almost immediately after occupying the city by incorporating other areas into its sphere of control. “When Israel occupied East Jerusalem it did not exceed 6000 dunums, each dunum equaling about 1000 square meters. It was expanded by annexing neighboring villages and towns to become 7200 dunums.”⁹² But it would not stop there and in fact “from 1968–1970, more than 18,270 dunums of Jerusalem land were confiscated by Israel and by 1996, 71% of Jerusalem had been confiscated.”⁹³ This expansion was protested by Jordan, the Arab community, and most of the world. “The United Nations General Assembly adopted two resolutions without opposition on July 4 and 14, 1967, which declared Israel’s actions invalid.”⁹⁴ Those protesting the Israeli expansion had legitimate reason to do so because “according to International law Israel is irrefutably a belligerent occupant and it is therefore obliged to govern its conduct according to international humanitarian law in the

⁹⁰ Admission on Attack, *The Times* (London, July 8, 1967), (quoting statement of Prime Minister Levi Eshkol) as seen in John Quigley, “Sovereignty in Jerusalem,” *The Catholic University of America Law Review: Vol 45*, (1996), 773.

⁹¹ Christopher Bradley, *The International Legal Status of Jerusalem* (master’s thesis, St. John’s University, 1981): 94.

⁹² Joshua Praver, and Ora Ahimeir, *Twenty Years in Jerusalem 1967–1987*, Ministry of Defense (Tel-Aviv, 1988): 16 as seen in Riziq Shuqair, *Jerusalem: Its Legal Status and the Possibility of a Durable Settlement* (Ramallah: Al-Haq, 1996), 17.

⁹³ Abraham Rabinovich, *The Jerusalem Post*, (9 March 1990) as seen in Riziq Shuqair, *Jerusalem: Its Legal Status and the Possibility of a Durable Settlement* (Ramallah: Al-Haq, 1996), 17.

⁹⁴ Christopher Bradley, *The International Legal Status of Jerusalem* (master’s thesis, St. John’s University, 1981), 55.

occupied territories.”⁹⁵ The fact that Israel is considered a belligerent occupant means that they fall under a separate set of requirements with regards to their actions over the area they occupy. “Belligerent occupation is subject to a body of law that has developed in the international community through the experience of warfare. A premise of the law of belligerent occupation is that the occupied territory is to be altered as little as possible, pending a resolution of the military conflict that precipitated the occupation, in the expectation that the belligerent occupant will ultimately withdraw.”⁹⁶ In addition to this, there are articles which are meant to prevent an occupying force from doing exactly what Israel has done. “International humanitarian law articles 4 and 47 of the Fourth Geneva Convention pertaining to the law of belligerent occupation prohibit the occupant from annexing occupied territory, imposing its sovereignty over it or taking any measures of a sovereign nature.”⁹⁷ Therefore, all actions taken by Israel to change any aspect of East Jerusalem during its occupation are illegal under International Law.

In objection to Israel’s actions in East Jerusalem, and the rest of the Palestinian territory, the United Nations passed almost a dozen resolutions between 1968 and 1996. Most of these resolutions focus on the Israeli expansion and the fact that it is completely invalid. However, resolution 465 passed on March 1, 1980, is the most interesting and provides some legal discussion points. Section 5 of resolution 465 states that the United Nations:

Determines that all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof have no legal validity and that Israel’s policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Geneva Convention relative to the Protection of Civilian Persons in Time of War

⁹⁵ Riziq Shuqair, *Jerusalem: Its Legal Status and the Possibility of a Durable Settlement* (Ramallah: Al-Haq, 1996), 6.

⁹⁶ Morris Greenspan, *The Modern Law of Land Warfare*, 223–224, (1959) as seen in John Quigley, “Sovereignty in Jerusalem,” *The Catholic University of America Law Review: Vol 45*, (1996): 774.

⁹⁷ G. Schwarzenberger, *International Law as applied by International Courts and Tribunals*, Stevens, (1968), Vol. II, P. 167–177 as seen in Riziq Shuqair, *Jerusalem: Its Legal Status and the Possibility of a Durable Settlement* (Ramallah: Al-Haq, 1996), 7.

and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East.⁹⁸

This resolution specifically talks about Jerusalem and the fact that Israeli actions within the city are invalid but more importantly it refers to the occupied areas as Palestinian and Arab territories. Therefore, from this resolution it appears that for the first time the United Nations is stating that East Jerusalem and the other areas occupied during the 1967 War did in fact belong to the Arabs. Therefore, Jordan at the time of this resolution did in fact have sovereignty over East Jerusalem despite Israel's occupation because "a transfer of title to territory in consequence of war could take place only as a result of the cession of the territory in a treaty of peace."⁹⁹ This brings validity to all previous resolutions calling Israel a belligerent occupant and also helps to confirm that the ceasefire in 1949 and the establishment of the Green Line had in fact become an actual border. Finally, this resolution may indicate that the United Nations had given up on the idea of making Jerusalem an international city thereby giving sovereignty to Israel in the West and Jordan in the East. Despite all of this Jordanian sovereignty in East Jerusalem would come to an end a few years after resolution 465 was signed.

⁹⁸ *UN Security Council Resolutions 1980* (March 1, 1980), <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/399/58/IMG/NR039958.pdf?OpenElement> (accessed January 25, 2012).

⁹⁹ Bradley, Christopher. *The International Legal Status of Jerusalem* (master's thesis, St. John's University, 1981), 83.

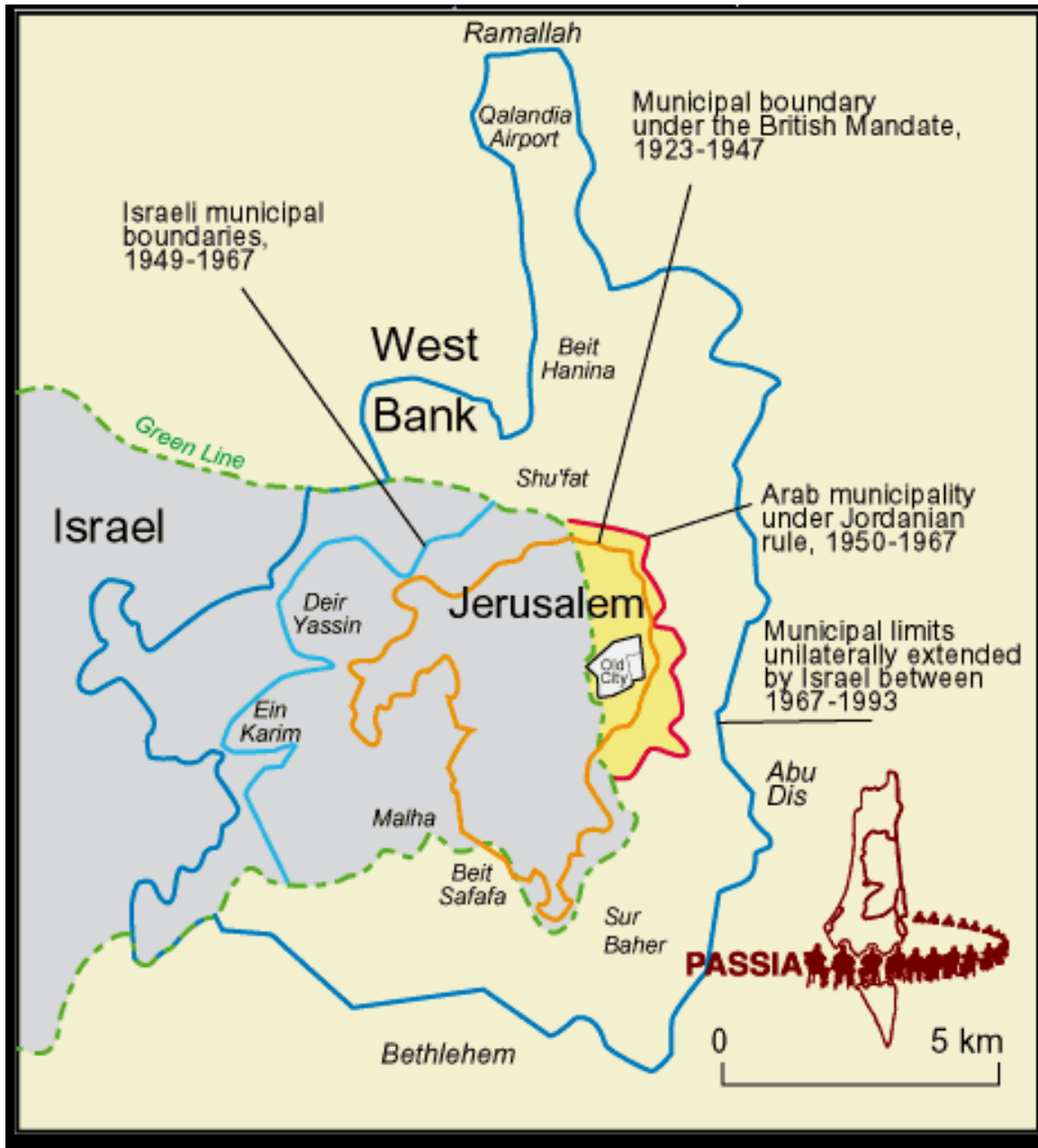


Figure 5. Municipal Boundaries¹⁰⁰

¹⁰⁰ Passia, "Municipal Boundaries," *Palestinian Academic Society for the Study of International Affairs* (2011), http://www.passia.org/palestine_facts/MAPS/images/jer_maps/Jlem1947-2000.html.



Figure 6. Israeli Settlements and Palestinians Neighboreds¹⁰¹

¹⁰¹ Passia, "Settlements," *Palestinian Academic Society for the Study of International Affairs* (2011), http://www.passia.org/palestine_facts/MAPS/images/jer_maps/Settlements.html.

4. Jordan Loses Sovereignty

In 1964, the Palestinian Liberation Organization was created as the voice of the Palestinian people. Initially this group received little recognition and even less support. The PLO was originally chartered to liberate Palestine through armed struggle and this included liberating it from Jordan as well as Israel. The PLO never supported Jordanian control which created an uneasy relationship which eventually led to the PLO's ejection from Jordan in 1970. But by 1974, the PLO had begun to step away from this hostile approach toward Jordan, albeit only slightly, which caused them to gain recognition from several countries and allowed them to gain observer status within the United Nations on November 22, 1974. During the 1980s, Jordan and the PLO began negotiations in order to bring about a solution to their disagreements. However, this proved to be difficult because Jordan wanted to maintain control while the PLO wanted a separate Palestinian state. The two never saw eye to eye and negotiations broke down. In 1987, the first intifada began and though King Hussein of Jordan supported it Yasser Arafat quickly rejected his support. In July of 1988, King Hussein finally succumbed to Palestinian pressure. Seeing that the PLO was increasing in standing among the Palestinians the King of Jordan decided to step away from control of the West Bank and East Jerusalem. "In 1988, King Hussein of Jordan, who had declared in 1950 that he annexed the West Bank, including Jerusalem, announced that he intended to dismantle the legal and administrative links between the West Bank and Jordan"¹⁰² and in July 1988, Jordan renounced all claims to sovereignty over the West Bank in favor of the PLO.¹⁰³

Jordan's decision to give control of the West Bank and East Jerusalem to the PLO was not its final step in the process. On October 26, 1994, Israel and Jordan signed a peace treaty which would mark the end of conflict between the two countries. A key part of this treaty was the recognition of Israel as a legitimate state by Jordan. Equally important was the fact that it recognized the borders of Israel as they were at that time.

¹⁰² Ruth Lapidot, "Jerusalem: Some Legal Aspects," In *Jerusalem A City and Its Future*, by Marshall Breger and Ora Ahimeir (Syracuse: Syracuse University Press, 2002), 71.

¹⁰³ "The Palestinians and the PLO," U.S. Library of Congress 2011, <http://countrystudies.us/jordan/62.htm>.

The treaty reads that “the boundary, as set out in this agreement, is the permanent, secure and recognized international boundary between Israel and Jordan, without prejudice to the status of any territories that came under Israeli military government control in 1967.”¹⁰⁴ This statement and the treaty effectively left the Palestinians on their own to negotiate with Israel over the final border and the possibility of a Palestinian state. In addition to this it also ended any claim that Jordan had to the West Bank and East Jerusalem since at this point they had publically relinquished control twice.

B. THE PALESTINIAN CLAIM

1. Palestinian’s Right to Sovereignty

Shortly after Jordan renounced its claims to the West Bank and East Jerusalem the PLO quickly began to increase their own claims towards the region. “In 1988, the Palestinian National Council of the Palestinian Liberation Organization proclaimed the establishment of the State of Palestine, with Jerusalem as its capital.”¹⁰⁵ While some states may have recognized this proclamation, is it legally binding? Lapidoth states that “a mere proclamation, even if it is followed by large scale recognition is not significant for the establishment of a state unless the four prerequisites are present: territory, population, effective government, and the ability to conduct international relations.”¹⁰⁶ In order to answer the question of the legitimacy of the PLO’s claim to sovereignty these four points must be addressed.

First, it is clear that the PLO is capable of conducting international relations. Although shaky at times it has been conducting international relations with increasing effectiveness since the early 1970s when it was granted observer status in the United Nations and have continued until today culminating with its recent entry into UNESCO. In addition, the PLO has successfully taken part in negotiations and peace treaties with

¹⁰⁴ *Israel Ministry of Foreign Affairs*, (2008), <http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/Israel-Jordan%20Peace%20Treaty>.

¹⁰⁵ Ruth Lapidoth, “Jerusalem: Some Legal Aspects,” In *Jerusalem A City and Its Future*, by Marshall Breger and Ora Ahimeir (Syracuse: Syracuse University Press, 2002), 71.

¹⁰⁶ Ruth Lapidoth, “Jerusalem: Some Legal Aspects,” In *Jerusalem A City and Its Future*, by Marshall Breger and Ora Ahimeir (Syracuse: Syracuse University Press, 2002), 71.

greater effectiveness than some recognized countries. Second, the Palestinians have a government in place although it is fragmented. There is still a split between the PLO and Hamas although this divide has been reduced over the last several years and with the recent agreement between the two mutually recognizing President Abbas this divide may be at an end. However, even if the division between the government entities continues they are still marginally effective and on occasion more effective than some countries with membership status in the United Nations. Further, during the 1993 Oslo Accords it was determined that the Palestinians had the right and the ability to self-government. Third, the PLO clearly has a population that follows it. A good portion of this population is currently under refugee status but they are a population nonetheless. Finally, there is the question of territory, which the PLO does have but further negotiations will be required in order to determine the extent of the territory that it has legal sovereignty over. At a minimum they have territory in the West Bank and the Gaza Strip which is enough to meet the criteria stated by Lapidoth. Therefore, the PLO does have a legitimate right to claim sovereignty and statehood but does it have the legal right to claim sovereignty over any part of Jerusalem? In order to answer this question we must again look at the British Mandate.

2. Palestinian's Claim under the Mandate

From the beginning of the British Mandate in Palestine the Arabs believed that Britain had overstepped its bounds and were in violation of the mandate's basic principles. "The Arabs argue that the Balfour Declaration was a contradiction to the principles underlying the whole mandatory system. The Arabs argue that the British promise to the Zionists violated Articles 20 and 22 of the Covenant which provided that the wishes of the communities must be a principal consideration in the selection of the mandatory."¹⁰⁷ Cattan states that "In accordance of Article 22 the states of Iraq, Lebanon, Syria, and Palestine were subjected to temporary mandates designed to assist them and to lead them to complete independence and that under this article they became states in

¹⁰⁷ Esco Foundation for Palestine, Inc., P. 223 as seen in Christopher Bradley, *The International Legal Status of Jerusalem*, Master's Thesis (St. John's University Press, 1981), 71.

international law.”¹⁰⁸ Further Cattan states that because of Article 22 “Palestine possessed its own statehood, its own nationality, and its own government.”¹⁰⁹ However, this is not entirely accurate. The territories under the mandatory were still considered underdeveloped and for that reason they were only provisionally recognized and not given full sovereign status at this point. Therefore, under the League of Nations the regions surrendered by the Ottoman Empire were not independent states but only areas of land with borders they had drawn in order to create states that at this point did not yet have sovereignty.

Despite the fact that sovereignty cannot be claimed out of the mandate it can still be claimed out of demographics and the right to self-determination. Even though Palestine does not exist as a country and some feel Palestinians were not a people until after the mandate they were still citizens of that region and after the Ottoman Empire surrendered they were the majority and therefore had the right to self-determination. “The valid aspect of the Arab case lies not in the claims revolving around the war commitments made by the Western powers during and after World War I, but in their right as inhabitants of the country.”¹¹⁰ The Palestinians not only inhabited the region but they were also the clear majority in and around Jerusalem. “The Palestinian claim to Jerusalem is founded on their long time status as the majority population of Palestine and even though the balance shifted in favor of the Jewish community during the 1948 war due to so many being displaced the Palestinians assert that their departure was involuntary and therefore does not affect their claim.”¹¹¹

The idea that the Palestinians were legal citizens of the region prior to occupation will become a key point later because establishing the Palestinians as legal citizens means that their protests over the occupation of East Jerusalem prevent Israel from gaining

¹⁰⁸ Henry Cattan, *The Palestine Question* (New York: Croom Helm, 1988), 22.

¹⁰⁹ Henry Cattan, *The Palestine Question* (New York: Croom Helm, 1988), 24.

¹¹⁰ Christopher Bradley, *The International Legal Status of Jerusalem* (master’s thesis, St. John’s University Press, 1981), 70.

¹¹¹ John Quigley, “Sovereignty in Jerusalem,” *The Catholic University of America Law Review: Vol 45*, (1996), 768.

sovereignty of the city. As Brownlie states, “neither Israel’s occupation of Palestine, nor its successive expansions, entitle it to claim Palestine as its own by prescription, if only because the State at whose expense prescription is claimed, never stopped protesting.”¹¹² Under International Law the occupying power can never gain sovereignty unless it is willfully surrendered by those occupied. Therefore, as long as the Palestinians are recognized as legal citizens of East Jerusalem prior to the 1967 War and they continue to protest the Israeli occupation since that time then the Israelis have no legal sovereignty over East Jerusalem.

¹¹² Ian Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 1966): 144 as seen in Christopher Bradley, *The International Legal Status of Jerusalem*, Master’s Thesis (St. John’s University, 1981), 91.

PALESTINE

IV. Distribution of population by sub-district, with percentages of Jews and Palestinians, 1946.

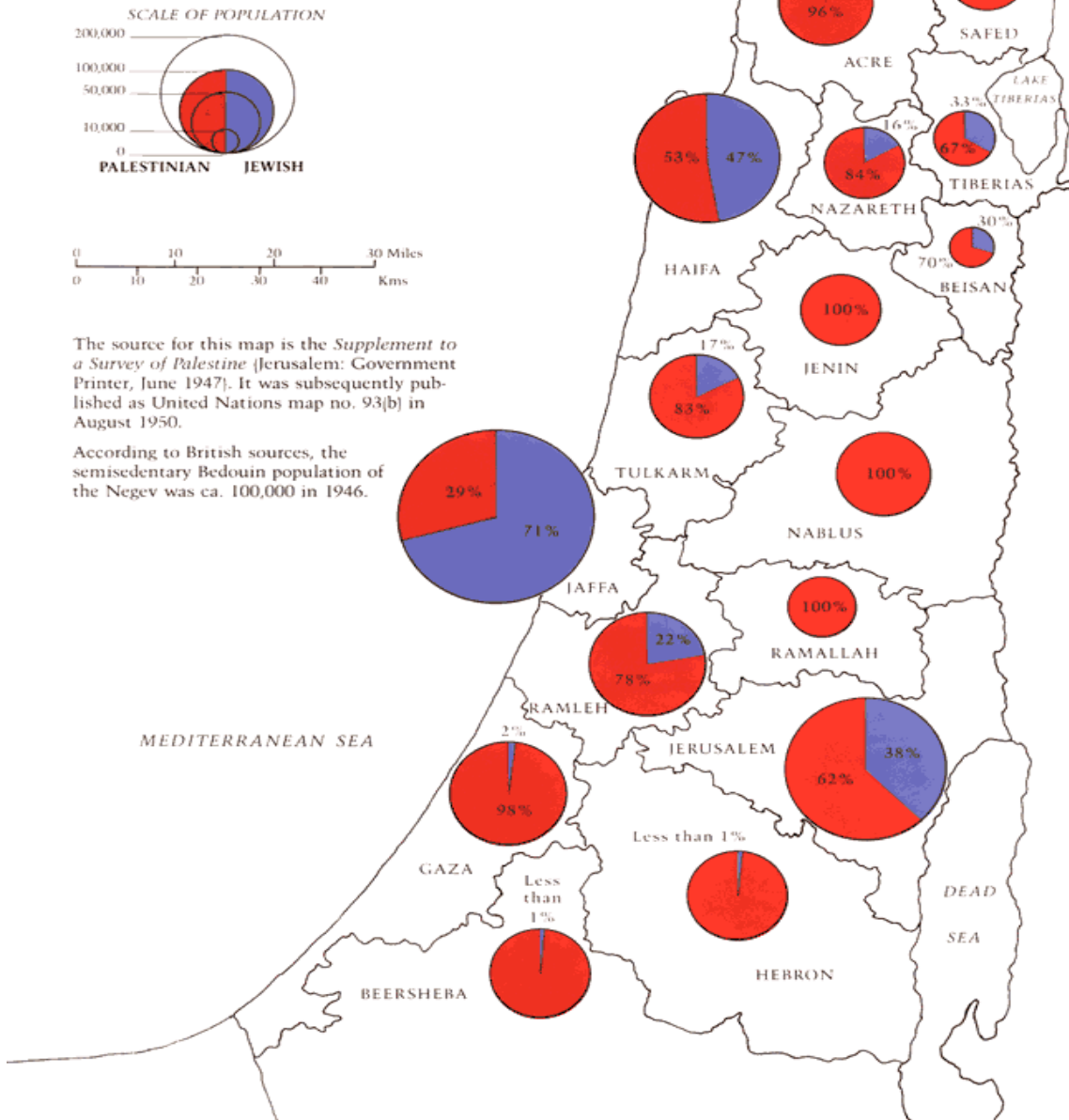


Figure 7. 1946 Demographics¹¹³

¹¹³ Passia, "1946 Demographics," *Palestinian Academic Society for the Study of International Affairs* (2011), http://www.passia.org/palestine_facts/MAPS/Distribution_of_population.htm.

3. Palestinian's Claim Since 1967

In addition to the claim maintained by the Palestinians out of International Law and the right to self-determination they also have legal sovereignty based on the actions taken by Jordan. As can be seen from the earlier discussion Jordan may have had legal sovereignty over East Jerusalem until 1988 when they officially ceded control of the city and the West Bank to the PLO. However, there are still claims that Jordan never had legal sovereignty in the first place so when they signed the peace treaty in 1994 giving up all claims to the region the PLO had reason to be concerned. In order to ensure its claim to East Jerusalem would not be diminished in the light of the 1994 peace treaty between Jordan and Israel, the Permanent Observer of Palestine to the United Nations, Nasser Al-Kidwa, presented a letter to the United Nations on October 19, 1994. This letter spoke of assurances by various actors that Palestine would not be forgotten after this treaty and that Israel was in fact a belligerent occupant in East Jerusalem. The United States was among these actors. The letter states:

It should be recalled that the Government of the United States of America, in its capacity as a co-sponsor of the peace process, also gave assurances to the Palestinian side on Jerusalem. In this regard, the United States' letter of assurances to the Palestinians, dated 24 October 1991, stated the following: The United States is opposed to the Israeli annexation of East Jerusalem and extension of Israeli law on it and the extension of Jerusalem's municipal boundaries. We encourage all sides to avoid unilateral acts that would exasperate local tensions or make negotiations more difficult or pre-empt their final outcome.¹¹⁴

In addition to the letter presented to the United Nations, the Declaration of Principles from the 1993 Oslo Accords also provided assurances that the Palestinians would be included in any negotiations involving Jerusalem. "The Declaration of Principles provisions state, inter alia, that the future of Jerusalem will be negotiated between Israel and the Palestinians in the permanent status negotiations to commence in 1996."¹¹⁵ Since the Declaration of Principles there have been several negotiations regarding the Israeli-

¹¹⁴ Nasser al-Kidwa, *The United Nations Information System on the Question of Palestine* (October 19, 1994), <http://unispal.un.org/UNISPAL.NSF/0/FD8260181A20E616852560EF006085D9>.

¹¹⁵ Moshe Hirsch, "The Future Negotiations Over Jerusalem, Strategic Factors and Game Theory," *The Catholic University of America Law Review: Vol 45*, (1996): 700.

Palestinian problem yet there have been no major negotiations towards the status of Jerusalem but this in no way diminishes the Palestinian claim.

It can be seen from the argument above that the Palestinians maintain a legal claim to East Jerusalem through multiple paths. The first is the fact that they were the majority population prior to the British Mandate in Palestine. The second is the fact that under International Law everyone is allowed the right to self-determination. While they were not recognized as Palestinians prior to the mandate the majority of the population did determine that they wanted to fall under Jordanian rule and the ten year requirement set by the United Nations for self-determination had been met. Therefore, prior to the 1967 War the people of the West Bank and East Jerusalem should have legally been considered to be under Jordanian sovereignty. This did not change after the 1967 War because the occupation of East Jerusalem by Israeli forces does not constitute a transfer of power. In 1988, Jordan officially gave control of East Jerusalem to the PLO which should be recognized as a legal transfer of sovereignty over the city which means that the peace treaty of 1994 has no bearing on the sovereignty of East Jerusalem. In addition, the Palestinian people, whether governed by Jordan or the PLO, have never stopped protesting the occupation of East Jerusalem nor have they ever ceded sovereignty to the city. For these reasons it appears that the Palestinians have legal sovereignty over the city of East Jerusalem.

C. DISCUSSION

In review, in order for the United States to ensure its own security and have any chance for a successful foreign policy in the Middle East it must find a way to help bring about a peace agreement between the Israelis and Palestinians. This in turn will help U.S. interests in the region in four major areas. First, U.S. relations with many in the region would improve allowing for more cooperation between the United States and countries that currently hold it in low regard. Second, the United States is concerned about stability in the region. This is due in part to the fact that the region produces the world's largest supply of oil and resolving the Arab-Israeli conflict will increase stability in the Middle

East.¹¹⁶ Third, a successful peace agreement between Israel and Palestine may help to alleviate some of the issues with Iran. Iran continues to pursue a nuclear weapons program and provides support for insurgents that are fighting western forces. They are able to pursue their interests in part because of their support for Palestine and anti-Americanism. Finally, the Global War on Terrorism would gain support in the region if there was a successful solution to the Israeli-Palestinian conflict. This is because a U.S.-backed peace settlement would remove a lot of the western opposition in the Arab states.

In order to bring about a successful peace agreement it is necessary to discuss the situation in Jerusalem and the legal sovereignty of that city. There are four competing claims to legal sovereignty over Jerusalem: first, there was a vacuum of sovereignty in Jerusalem which was rightfully filled by Israel due to their need for self-defense; second, is the idea that the Palestinians hold legal sovereignty over Jerusalem; third, is the thought that Jordan still has legal right to East Jerusalem; and fourth is the United Nations' idea for making Jerusalem a city governed by the international community.¹¹⁷ During this thesis I have laid out the arguments behind these four differing claims and through this it becomes possible to determine who has legal sovereignty over Jerusalem. The establishment of who has legal sovereignty is important because it provides the necessary background and understanding that will allow negotiations to come from a position of knowledge and not one of emotion.

¹¹⁶ Bichler, Shimshon, and Jonathan Nitzan. "Putting the State in it's Place: U.S. Foreign Policy and Differential Capital Accumulation in Middle East Energy Conflicts," *Review of International Political Economy* (1996): 618.

¹¹⁷ Ruth Lapidoth, *Jerusalem and the Peace Process-Jul-94*. (1994), http://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1994/7/JERUSALEM+AND+THE+PEACE+PROCESS+-+Jul-94.htm.

V. CONCLUSION

A. LEGAL SOVEREIGNTY

In conclusion, of the four possible options for legal sovereignty over Jerusalem it is fairly easy to eliminate two. First, the United Nations claim to sovereignty over Jerusalem is convincing because of its uninterrupted timeline of legal rights to the city since the fall of the Ottoman Empire. However, due to its failure to actually function as a governing body over Jerusalem since before the first Arab-Israeli War its claim falls into question. Further, during the period since the first Arab-Israeli War the United Nations has passed resolutions which give the appearance that it has relinquished control. For example Resolution 242 denounces the Israeli occupation of East Jerusalem but there has not been any U.N. condemnation of Israel's presence in West Jerusalem. "Resolution 242 refers solely to East Jerusalem because it only discusses the occupation following the 1967 War. The Resolution does not mention the western part of Jerusalem which was occupied before, indicating that the Council considers it a de facto situation."¹¹⁸ This gives reason to believe the United Nations had in fact recognized Israeli sovereignty over West Jerusalem and Jordanian sovereignty over East Jerusalem. Further, Resolution 465 specifically refers to East Jerusalem as Palestinian and Arab territory which again gives the appearance that the United Nations did in fact give up its claim to sovereignty over the city. These points effectively eliminate any claim that the U.N. has to either East or West Jerusalem.

Second, both Israel and Jordan have claimed that there was a void of sovereignty and therefore each had the right to move into Jerusalem and claim it as their own. However, throughout this thesis I have pointed out that there was never a void in sovereignty. In fact throughout this thesis sovereignty over Jerusalem has been traced from the Ottoman Empire to the British Mandate and the United Nations and then branching between Israel, Jordan, and the Palestinians. Therefore, the argument that the

¹¹⁸ Riziq Shuqair, *Jerusalem: Its Legal Status and the Possibility of a Durable Settlement* (Ramallah: Al-Haq, 1996), 33.

mandate and subsequent British withdrawal created a void is not a valid point. This can be seen within the mandate itself which was an “arrangement involving a trust relationship where Britain administered Palestine for the benefit of its population. That population was deemed to be the beneficial title holder if not sovereign, but upon Britain’s withdrawal the rights of the citizens could not be ignored. Therefore, there was never a void of sovereignty but only latent sovereignty.”¹¹⁹ Since Jordan occupied East Jerusalem after the British withdrawal and the Palestinians did not protest this occupation, many actually identified with it, than Jordan should have become the legal sovereign of East Jerusalem from that time forward and based on the argument presented in this thesis it is fairly clear that Jordan was the legal sovereign after the first Arab-Israeli War. However, due to the actions taken by Jordan in 1988 and then again in 1994, when it officially relinquished all claims to Jerusalem, it is also clear that Jordan no longer has any claim to any part of Jerusalem or the West Bank.

Next, Israeli sovereignty in Jerusalem has been in question since the First Arab-Israeli War. While almost everyone recognizes Israel and its right to exist most states “have not recognized Israeli sovereignty over either the western or eastern sector of Jerusalem despite nearly half a century of Israeli control in west Jerusalem and nearly thirty years in east Jerusalem.”¹²⁰ As mentioned earlier Israel believes that it was granted sovereignty over Jerusalem under the resolution that recognized its government. However, under resolution 181 Jerusalem was not part of either Israel or Palestine and therefore this does not provide any validity to Israel’s claim to Jerusalem.¹²¹ Next, Israel’s claim that it has sovereignty over Jerusalem out of necessity for self-defense during the Six Day War is also unfounded. “When territory is taken during hostilities, it falls under a regime called belligerent occupation. Belligerent occupation yields no sovereignty. It does not matter whether the belligerent power’s use of force was

¹¹⁹ John Quigley, “Jerusalem West and East: The Question of Sovereignty,” *The American Committee on Jerusalem*, Occasional Paper Series, (1996): 2.

¹²⁰ John Quigley, “Sovereignty in Jerusalem,” *The Catholic University of America Law Review: Vol 45*, (1996), 777.

¹²¹ John Quigley, “Jerusalem West and East: The Question of Sovereignty,” *The American Committee on Jerusalem*. Occasional Paper Series, (1996): 1.

aggression or lawful defense. Thus, even if Israel acted defensively, it would not acquire sovereign rights to East Jerusalem.”¹²² Those that choose to ignore this point claim that Israel has sovereignty over Jerusalem due to the steps it has taken since its occupation to improve the city. Some have also stated that the only thing left for Israel to do in order to annex Jerusalem and have sovereignty over the entire city is to officially announce its annexation. Israel did in fact “declare its sovereignty over East Jerusalem in 1980 when the Knesset decreed that Jerusalem complete and united was the capital of Israel”¹²³ but these points are also not valid. They are not valid because as an occupying power Israel is, by International Law, forbidden to make changes to the city. In addition International Law does not allow for an occupier to take steps towards the annexation of the territory occupied.

Additionally, since Israel and Jordan were both members of the United Nations prior to the 1967 War they both agreed to recognize the others state and its borders. This point alone is enough to declare Israel an occupying power in East Jerusalem and nothing more. Despite all of this, Israel does in fact have a claim to Jerusalem but only to the western section of the city. This claim is based on the fact that Israel, like Jordan, moved into Jerusalem during the First Arab-Israeli War which resulted in the establishment of the Green Line. Though not originally established as a border it existed for almost twenty years with relatively little disagreement between parties which is a reasonable amount of time to consider it a de facto border, similar to the DMZ separating North and South Korea. Also, based on United Nations resolutions it is clear that the UN was willing to accept an Israeli control West Jerusalem and since the UN was considered to be the primary controlling body of the city at that time this could be viewed as a legitimate transfer of sovereignty. Now, it would be more convenient if the United Nations would officially announce the transfer of sovereignty but in the absence of any action taken by

¹²² John Quigley, “Jerusalem West and East: The Question of Sovereignty,” *The American Committee on Jerusalem*, Occasional Paper Series (1996): 3.

¹²³ John Quigley, “Jerusalem West and East: The Question of Sovereignty,” *The American Committee on Jerusalem*, Occasional Paper Series (1996): 4.

that body, the resolutions should be sufficient. However, it is important to again point out that Israel's sovereignty applies only to West Jerusalem and that it in no way has any legitimate claim to East Jerusalem.

Finally, both the Israelis and the Palestinians have offered up points that they have sovereignty over the region based on past history but this is not necessarily a valid claim. Quigley points out that "ancient title that has been superseded by occupation by others is not regarded in International Law as giving rise to sovereign rights."¹²⁴ Absent historical claims and focusing only on the period since the fall of the Ottoman Empire allows for the most accurate determination of legal sovereignty over Jerusalem. Above, I stated that Israel has sovereignty over West Jerusalem but not over East Jerusalem. This is because the Palestinians have a clear claim to legal sovereignty over East Jerusalem. The Palestinian claim to East Jerusalem can be traced from the fall of the Ottoman Empire in the same manner as the Israeli claim to West Jerusalem. After the end of the British Mandate in Palestine sovereignty to Jerusalem fell to Israel in the west and Jordan in the east based on the end of the First Arab-Israeli War and the establishment of the Green Line. Israel has maintained control of West Jerusalem since that time but East Jerusalem has shifted hands. As mentioned earlier, Jordan official relinquished control of all its occupied Palestinian territory in favor of the Palestinians and the PLO in 1988. In 1994, Jordan again announced that it was removing itself from control of East Jerusalem and the West Bank during a peace agreement between itself and Israel. The day after this agreement the United Nations acknowledged Palestinian concerns and announced that nothing would be done with regards to East Jerusalem without the agreement of the Palestinians. Therefore, from 1988 to the present, the Palestinians have had legal sovereignty over East Jerusalem despite every effort Israel has made to refute this claim.

¹²⁴ John Quigley, "Jerusalem West and East: The Question of Sovereignty," *The American Committee on Jerusalem*, Occasional Paper Series, (1996): 1.

B. THE WAY AHEAD

As mentioned in Chapter I, there are four possibilities regarding a solution over Jerusalem. Option one is for Israel to continue exercising control over the city in its entirety which would be agreeable to the Israelis but would be completely rejected by the Palestinians and most of the world. This is because it is necessary for any governing body over the Palestinian people to negotiate for at least part of Jerusalem to become the capital of Palestine when the state is established. Failure to do so would infuriate the Arab World and “a united Jerusalem under only one state would never know peace.”¹²⁵ Therefore, this first choice provides no chance for a settlement and should be rejected. The second option is for both the Israelis and the Palestinians to relinquish control of the city in favor of an international regime. This option has been brought up in the past and has been determined unacceptable by both parties. Any international regime put in place would receive resistance from both the Israelis and Palestinians meaning that, once again as in the first option, the city would never know peace and therefore this option is also rejected. The third option is for the Palestinians to gain full control over East Jerusalem. This would be agreeable to many of the Palestinians and may even be enough to prevent future conflicts over the city by all but the most radical. However, because of the more than 40 years of Israeli occupation in East Jerusalem and the establishment of Israeli settlements in the area it would be difficult if not impossible to get the Israelis to agree to this option. For this reason the third option has little chance for success but should not be thrown out entirely especially due to the fact that it has already been determined that the Palestinians have sovereignty over this part of the city. The fourth option, which has the best chance for success, is to negotiate a partial agreement that allows some part of East Jerusalem to fall under Palestinian sovereignty.¹²⁶ This is the best option because it allows Israel to keep the majority of Jerusalem while providing a capital for a newly established Palestinian state.

¹²⁵ Chad Emmett, “The Status Quo Solution for Jerusalem,” *Journal of Palestine Studies* (1997): 17.

¹²⁶ Moshe Hirsch, “The Future Negotiations Over Jerusalem, Strategic Factors and Game Theory,” *The Catholic University of America Law Review: Vol 45* (1996): 709.

The proposal that has had the greatest following thus far by both sides was laid out in the Beilin-Abu Mazen Plan. This plan closely follows option four above by proposing an arrangement where Israel would have its capital in West Jerusalem while a Palestinian state would have its capital in a section of East Jerusalem to be called al-Quds. This plan allows Israel to keep some of the settlements in and around East Jerusalem while extending the municipal boundaries of East Jerusalem and giving this area along with part of original East Jerusalem to the Palestinians. This agreement was never established between the Israelis and Palestinians because when it was made public it was attacked by extremists on both sides as being unacceptable and was therefore discarded. However, despite those that considered this plan unacceptable there were many more, on both sides, that were willing to move in the direction that this agreement proposed. One proponent of this type of solution is Alan Dershowitz who states that “Jerusalem must be divided if peace is to be achieved. Jerusalem must be divided politically because it is already divided geographically and demographically.”¹²⁷ After researching the four possible solutions listed above I believe that the Beilin-Abu Mazen Plan has the best chance of reaching a successful agreement.

The Beilin-Abu Mazen Plan provides proposals that are important to both parties and are necessary for the establishment of a city with two capitals. The first proposal of this plan is to increase the municipal boundaries of Jerusalem to include Jewish and Arab communities around the city. This allows for the space that is required to support two distinctive Israeli and Palestinian communities to exist within the same city yet independent of each other. Next, this plan also provides a proposal for the establishment of one governing body over the city in a condominium style municipality. “A condominium is when a piece of territory consisting of land or water is under the joint tenancy of two or more states, these states exercise sovereignty conjointly over it and

¹²⁷ Alan Dershowitz, *The Case for Peace: How the Arab-Israeli Conflict can be Resolved* (Hoboken: John Wiley and Sons, 2005).

over the individuals living thereon.”¹²⁸ The Beilin-Abu Mazen Plan lays out the guidelines for this condominium in Article VI sections 4 and 5 which read:

The Parties agree to maintain one Municipality for the City of Jerusalem in the form of a Joint Higher Municipal Council, formed by representatives of the boroughs. These representatives will elect the Mayor of the City of Jerusalem. In all matters related to the areas of the City of Jerusalem under Palestinian sovereignty, the Joint Higher Municipal Council shall seek the consent of the Government of Palestine. In all matters related to the areas of the City of Jerusalem under Israeli sovereignty, the Joint Higher Municipal Council shall seek the consent of the Government of Israel. The City of Jerusalem shall consist of the Joint Higher Municipal Council, two sub-municipalities - an Israeli sub-municipality, elected by the inhabitants of the Israeli boroughs, and a Palestinian sub-municipality, elected by the inhabitants of the Palestinian boroughs - as well as a Joint Parity Committee for the Old City Area.¹²⁹

In addition to these points, the Beilin-Abu Mazen Plan also ensures that upon reaching an agreement the newly established state of Palestine and its government will recognize West Jerusalem, or Yerushalayim, as the capital of Israel while Israel and its government will recognize East Jerusalem, or al-Quds, as the capital of Palestine. It is also important to point out that even with the city falling under two states it will remain one municipality and therefore this plan ensures that the city of Jerusalem will remain open to all peoples and religions.¹³⁰ This point raises some concern about the governing body over the religious structures and areas of Jerusalem but the Beilin-Abu Mazen Plan also lays out a proposal regarding the Old City. Article VI sections 11 through 14 designates the need that the Old City be given a “special status.”¹³¹ This special status would consist of two sub-municipalities, one Israeli and one Palestinian, just as the

¹²⁸ Ian Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 1966): 107 as seen in Christopher Bradley, *The International Legal Status of Jerusalem*, Master’s Thesis (St. John’s University, 1981), 101.

¹²⁹ “The Beilin-Abu Mazen Document,” The Jewish Virtual Library October 31, 1995, <http://www.jewishvirtuallibrary.org/jsource/Peace/beilinmazen.html>.

¹³⁰ “The Beilin-Abu Mazen Document,” The Jewish Virtual Library October 31, 1995, <http://www.jewishvirtuallibrary.org/jsource/Peace/beilinmazen.html>.

¹³¹ “The Beilin-Abu Mazen Document,” The Jewish Virtual Library October 31, 1995, <http://www.jewishvirtuallibrary.org/jsource/Peace/beilinmazen.html>.

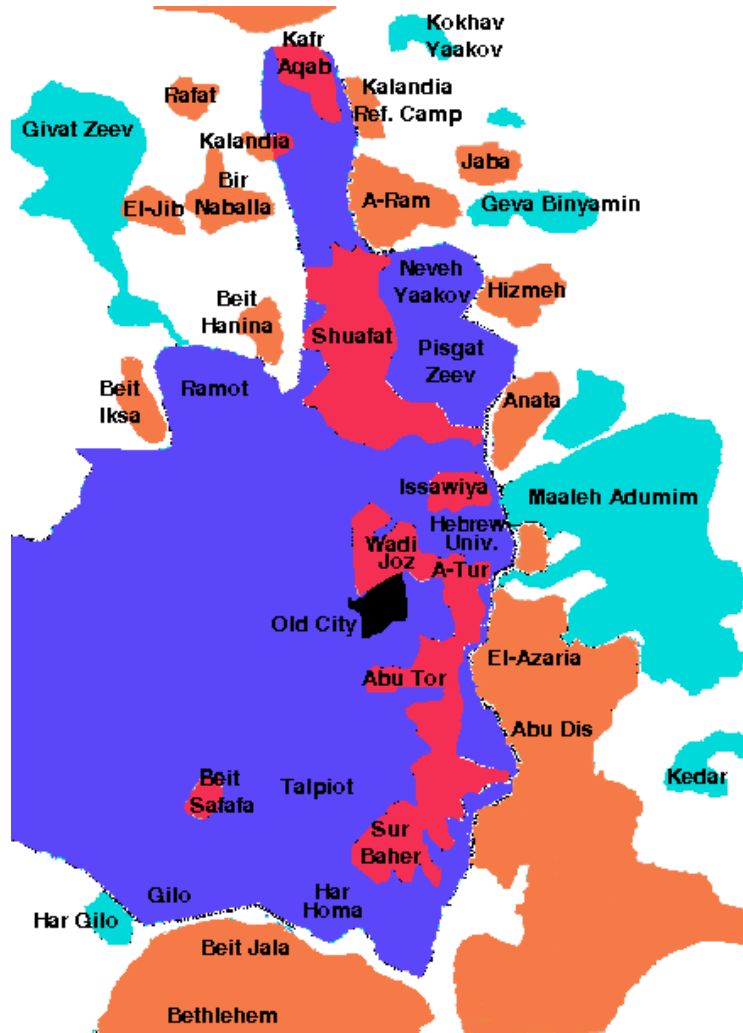
overall city of Jerusalem but these two municipalities must refer to the joint committee over Jerusalem for disagreements and differences vice referring to their individual governments. The plan also prevents the opportunity for disagreement between the two parties over who has control of what by stating that territorial sovereignty will be granted to Palestine for control over the Haram ash-Sharif and the Church of the Holy Sepulcher while Israel will maintain control over the Wailing Wall and other Jewish sites.¹³²

In conclusion, the Beilin-Abu Mazen Plan provides the best option for an agreeable solution because it will allow for both Israeli citizens and Palestinian citizens to live and work in and around Jerusalem while each can claim it as the capital of their independent state. Now, there is no plan available that will be completely acceptable to everyone from both parties which is why this plan failed the first time through. The extremists in Israel will not settle for anything less than a united Jerusalem, in its entirety, as the capital of Israel. The extremists in the Arab community refuse to recognize Israel's right to exist and will not rest until Israel is pushed into the sea. It was these groups that prevented this plan from becoming a reality. These extreme points of view exhibit the most problematic obstacle with any peace settlement involving Israel and Palestine but it is an obstacle that must be overcome if any solution is to be successful. The majority of Israelis and Palestinians want a peaceful resolution and many in both parties are willing to give in order to get it. It is this majority that must attempt to keep their own extremists in check when a reasonable solution is presented and when discussing Jerusalem the Beilin-Abu Mazen Plan is a reasonable solution.

¹³² "The Beilin-Abu Mazen Document," The Jewish Virtual Library October 31, 1995, <http://www.jewishvirtuallibrary.org/jsourc/Peace/beilinmazen.html>.

This plan covers and answers the major concerns presented by both Israelis and Palestinians. The Israelis will get to keep most of Jerusalem and have it recognized as their capital by the Palestinians and the world. The Palestinians will finally be able to claim part of Jerusalem as their capital which has long been considered a requirement for the establishment of a Palestinian state. In addition, this option offers freedom of religious pursuit for all three of the monotheistic beliefs which has been a historical precedent as a requirement for peace. “For four centuries Jerusalem was under the exclusive control of the Ottoman Empire. Though not an entirely satisfactory solution for either Christians or Jews, the fact remains that for four hundred years a united city existed in a manner which, by and large, permitted adequate pursuit of the three dominant religious faiths.”¹³³ Although the city was control by just one state during the Ottoman Empire it is still possible to believe that a united city controlled by two states with just one governing body would have an equal amount of success.

¹³³ Elihu Lauterpacht, *Jerusalem and the Holy Places* (London: Anglo-Israeli Association, n.d.), 6.



- Present municipal boundaries
- Jewish areas to be annexed to Jerusalem
- Arab neighborhoods of Jerusalem to be ceded to Al-Quds
- Arab areas outside Jerusalem to be designated Al-Quds
- Jerusalem's Old City: to be divided between Jerusalem and Al-Quds¹³⁴

Figure 8. Beilin-Abu Mazen Plan

¹³⁴ *The Jewish Virtual Library: Barak's Proposal to Divide Jerusalem.* (July 2000): <http://www.jewishvirtuallibrary.org/jsourc/Peace/jerdivide.html>.

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